MISSISSIPPI LAW JOURNAL

ARTICLES

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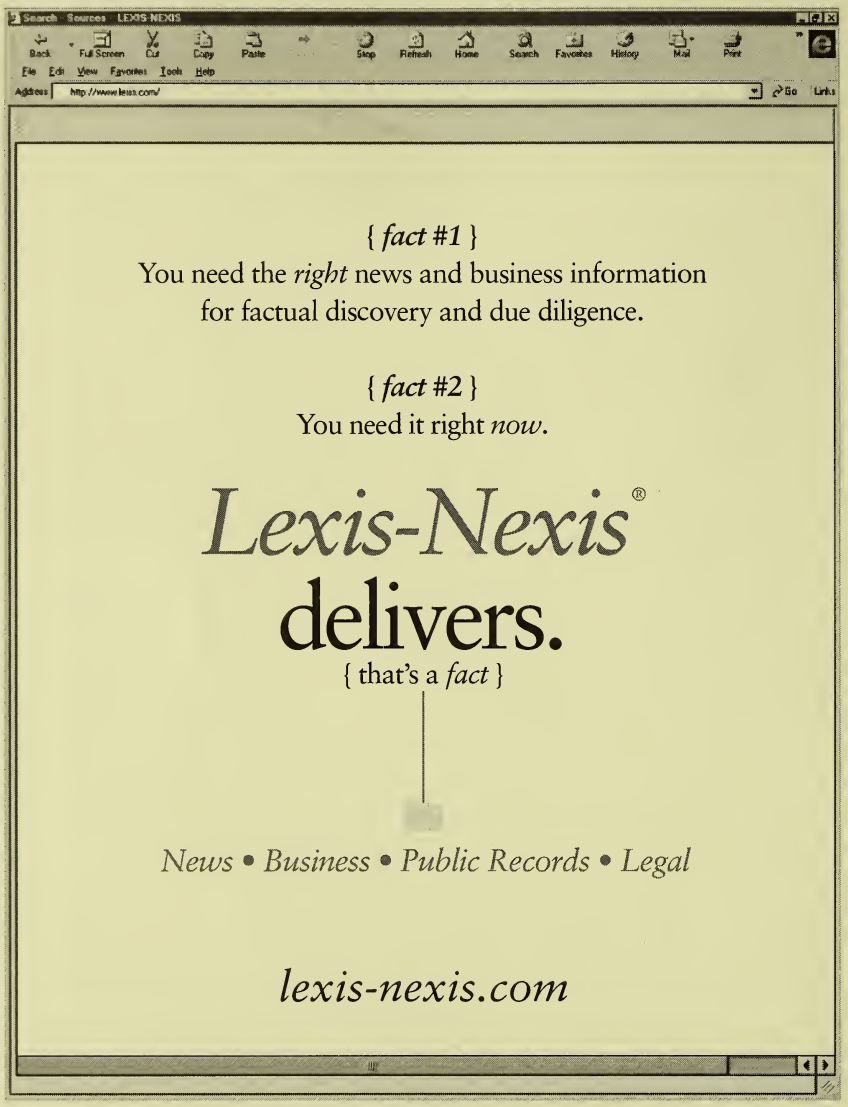
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[*] Presiding Judge, Mississippi Court of Appeals. A brief overview of these issues appeared in the *Hinds County Bar Association Newsletter*. Permission to reproduce some of that article is gratefully acknowledged. Leslie Southwick, *Separation of Powers: Three Recent Challenges in Mississippi*, HINDS COUNTY BAR NEWSL. 12-13 (Aug. 2000).

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SEPARATION OF POWERS AT THE STATE LEVEL: INTERPRETATIONS AND CHALLENGES IN MISSISSIPPI

INTRODUCTION

The United States Supreme Court in the last decade of the twentieth century rediscovered federalism. The pronouncements are as remarkable for their constitutional boldness as for their consistently narrow majorities. The Court is insisting on obedience to constitutional structural commandments. It is as if the text that is being followed begins along these lines:

> In the Beginning, the New World was without Form, and void, and the Patriot Fathers said "Let There Be States." Behold, there were States, and it was Good.[1]

The states later in convention assembled, formed a national government and delegated some of their powers to that government, but the states remained the foundation.

Equally fundamental and potentially dramatic are the separation of powers issues that have arisen in Supreme Court decisions over the last decade. "First principles" can be pursued one metaphor further so that the Biblical quality of separation of powers norms may also be perceived. The three residents of the Garden of Eden[2]—Adam, Eve and the serpent—represent, for my purposes, the legislative, executive and judicial branches of government, but no snake-like qualities for any of the branches are implied. The "Separation of Powers Garden" contains an unsettling secret. Each of the three is to pursue happiness while abiding by the commandment to respect the rights of the others. However, eating fruit from the Tree of Knowledge

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[1] Similarities to *Genesis* 1:1-3, 10, are intended. The connection between creationism and federalism was suggested to me by the title to an article by Virginia Law School Professor John C. Harrison. *See* John C. Harrison, *In the Beginning Are the States*, 22 HARV. J.L. & PUB. POL'Y 173 (1998).

[2] *See Genesis* 2-3.

will reveal this: transgressions give at least temporal pleasures, immediately risk only the grumbling of the other two in the Garden, and you may succeed. Temptation is born.

This return by the Supreme Court to the original scripture of federalism, or as some opposed to the outcomes might claim, to the original sin of the constitutional fathers, began in earnest with *United States v. Lopez*[3] in 1995. The Court found that the Commerce Clause could not be invoked to support prohibitions on possession of guns at schools.[4] Such a result has been presaged in *National League of Cities v. Usery*, in which the Court found that Congress could not bring the states under the requirements of the Fair Labor Standards Act.[5] *National League of Cities* was an uncertain trumpet, as it was silenced temporarily when it was overruled by *San Antonio Metropolitan Transit Authority v. Garcia*[6] in 1985. Instead of constitutional structural protections, the Court found that the states could resist congressional overreaching only through the normal political process.[7] The banishment of federalism from the Garden has been noted this way:

> From 1937 to 1995, federalism was part of a "Constitution in exile." Except for the brief interlude of the *National League of Cities* doctrine—which, like Napoleon's ill-fated return from Elba, met with crushing defeat—the post-New Deal Supreme Court has been almost completely unwilling to enforce constitutional limits on national power vis-a-vis the states.[8]

In the few years since *Lopez*, federalism has maintained its return to power, though the uncertain permanence of returns from exile is well-captured in the allusion to Napoleon from Elba. The authority of Congress to "dragoon" or "commandeer" state officials to enforce federal laws was denied in the 1997 decision of *Printz v. United States*.[9] Then in *United States v.*

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[3] 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990).

[4] *Lopez*, 514 U.S. at 551.

[5] Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

[6] 469 U.S. 528 (1985).

[7] *Garcia*, 469 U.S. at 531.

[8] Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 75 (2001).

[9] 521 U.S. 898 (1997) (holding local sheriffs could not be made to perform

Morrison in 2000, the Commerce Clause was found not to permit Congress to provide a civil remedy under the Violence Against Women Act, since that remedy was not a regulation of activity that substantially affected interstate commerce.[10]

The Eleventh Amendment has also been reinvigorated. In *Seminole Tribe v. Florida*, the Court in 1996, found that the Eleventh Amendment barred Congress from using its Article I power to permit suits by private individuals against nonconsenting states in federal court.[11] Three years later in *Alden v. Maine*, the Court found that a federal statute passed under Congress's general Article I authority could not be enforced against the states even in state courts unless the state had consented to the suit.[12]

For longer than *Lopez* has allowed the exiled concept of federalism to return to power, the Supreme Court has considered separation of power principles affecting the different branches of the federal government. Unlike the Supreme Court's bold pronouncements that reshaped the boundaries of sovereignty between the state and federal governments, the Court has been accommodating in defining the boundaries within the parts of the federal government. There is not "a hermetic sealing" of the compartments of government from each other.[13] Instead of theories about pure separation, the Court has applied the specific relevant constitutional provisions to understand the framers' division of power in a specific context. Often this has arisen when Congress created unorthodox governmental entities to address specific problems.

For example, the recurring controversies over the integrity of elections led to the creation of the Federal Election Commission in 1974. In the 1970's, the concerns were about the candidates and their financial benefactors and not over the simple counting of votes. In *Buckley v. Valeo*, the Court examined whether the Commission could exercise the executive authority

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back-ground checks prior to gun purchases under federal "Brady Bill").

[10] United States v. Morrison, 529 U.S. 598, 601-02 (2000).

[11] Seminole Tribe v. Florida, 517 U.S. 44, 47 (1996).

[12] Alden v. Maine, 527 U.S. 706, 712 (1999).

[13] *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976).

that it was given even though among the six voting members of the Commission were four appointees of leaders of the House and Senate and only two Presidential appointees.[14] Whether this arrangement was constitutional was a significant issue. The Court examined "the fundamental principles of the Government established by the Framers of the Constitution," which included that the powers exercised by the three principal departments of government "be largely separate from one another."[15] The Court quoted James Madison on the subject:

> The reasons on which Montesquieu grounds his maxim are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, the judge might behave with all the violence of *an oppressor*." Some of these reasons are more fully explained in other passages; but briefly stated as they are here, they sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author.[16]

Total separation was not required, as many parts of the Constitution indicated that one branch's check helped balance another branch's power. For example, "The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President."[17] There was practicality and not just theory in the manner in which powers were separated. Among the practical considerations

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[14] *Buckley*, 424 U.S. at 127, 137

[15] *Id.* at 120.

[16] *Id.* at 120-21 (quoting THE FEDERALIST NO. 47, at 302-03 (Alexander Hamilton) (G.P. Putnam's Sons ed., 1908)).

[17] *Id.* at 121.

were these:

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[18]

The result of these considerations in *Buckley* was that Congress was denied the authority to create a body that exercised such powers without the members of the governing board being named consistently with the Appointments Clause of the Constitution. The Court found that these voting members of the Commission were in substantial respects exercising powers that were those of "Officers of the United States," who had to be appointed by the President.[19]

Exactly how to segregate and integrate powers simultaneously has led to a variety of decisions. In another appointments clause case, the Court in *Bowsher v. Synar* invalidated the giving of substantial executive branch decision-making authority to the comptroller general, an official who could be discharged by Congress and therefore potentially was subject to Congress's primary control.[20] A one-house veto of executive branch decisions on deportation of aliens was found to violate the constitution in *INS v. Chadha*.[21] In *City of Boerne v. Flores*, the Court had a suit that involved both separation of powers and federalism.[22] Congress erred in the Religious Freedom Restoration Act first by statutorily redefining the meaning of "free exercise of religion," then in intruding "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[23]

The separation of powers case that had the most political

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[18] *Id.* at 122 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

[19] *Buckley*, 424 U.S. at 142 (citing U.S. CONST. art. II, § 2, cl. 2).

[20] Bowsher v. Synar, 478 U.S. 714, 736 (1986).

[21] 462 U.S. 919 (1983).

[22] 521 U.S. 507 (1997).

[23] *City of Boerne*, 521 U.S. at 532.

repercussions after its release was *Morrison v. Olson*.[24] The Court found that the statute creating the office of independent counsel was constitutional, even though the counsel was named by a panel of judges.[25] That ruling rejected an argument under *Buckley* that since this official exercised significant executive branch prosecutorial functions, the President must make the appointment.[26] Once independent counsels over the next twelve years had, with equal zealousness, investigated Democratic and Republican presidents, what had once seemed necessary became fairly universally viewed as dangerous.[27] Perhaps there is wisdom in these aged principles of government.

That wisdom includes that the enforcement of the constitutional commandments dividing power horizontally within one level of government and vertically between the federal and state systems fulfills the founders' public policy purpose of avoidance of tyranny through governmental inefficiency. The checks and balances within and between sovereign governments lead to negotiation, compromise and moderation. The absence of those restraints leads to excesses.

The federal perspective on federalism and separation of powers frequently draws attention of analysts.[28] Less examined is the reverse of this view of federalism from the national level to the states: how are states using the new areas in which congressional trespassers were identified and evicted? Further, how do states assign responsibilities within their own tripartite government structures? The former examination, considering the state half of federalism, is for others. What I will undertake is understanding the approach that one state has taken to the separation of powers among its legislative, executive and judicial branches. That state is Mississippi.

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[24] 487 U.S. 654 (1988).

[25] *Morrison*, 487 U.S. at 677.

[26] *Id.* at 693.

[27] Lanny Davis, *Spinning Out of Control: The Scandal Machine*, 60 MD. L. REV. 41, 52 (2001) ("power of the Independent Counsel Act, before its merciful expiration in 1999, . . . can be profoundly dangerous to our democratic system of justice.") Mr. Davis served as counsel for President Bill Clinton. *Id.* at 58 n.a1.

[28] *E.g.*, Roger C. Hartley, *The* Alden *Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323 (2000); Symposium: *Reviving the Structural Constitution*, 22 HARV. J.L. & PUB. POL'Y 181 (1998).

A state perspective on these divisions can be instructive for a number of reasons. The doubts raised about the compliance by the three federal branches with structural norms continue at the state level for similar practical reasons. One United States Supreme Court Justice's description of the cause of significant trespassing by one branch onto another's turf is that the honor system is the only initial restraint.[29] Each branch has a "sworn obligation" to operate within proper constitutional bounds; however, the "absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so," leads to temptation at the state as well as the federal level.[30]

Mississippi had significant struggles with intergovernmental trespassing during the last year of the twentieth and the first years of the twenty-first century. The state's government should have been at its most politically harmonious in a decade. A Republican governor, whom many in the legislature's Democratic majority found to be abrasive, left office in January 2000. The new Democratic governor and lieutenant governor were former legislators themselves. Yet in this supposed "Era of Good Feelings," serious challenges to the tranquility of the separate co-equal branches of government arose.

One incursion occurred when the state supreme court concluded that the one hundred year old statute that approved a state flag had inadvertently been repealed soon after its passage. The result of the judicial decree, namely, ending the state flag's official status, overrode the legislature's refusal to do so. As an examination of the case will show, a finding of inadvertent repeal is questionable. Generically, this can be seen as one branch initiating action once it decides that another branch has failed to use its primary authority.

Another example arose when a minority in the legislature desired to disrupt plans for the final week of the 2000 session by demanding that a state constitutional provision be followed that, upon request, each bill be read aloud in its entirety before

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[29] United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).
[30] *Lopez*, 514 U.S. at 568, 578.

final vote.[31] The presiding officer in each house ruled that the measures were not "bills" but were a different legislative species called "conference reports." Some legislators sought an injunction. A trial judge insisted that these were "bills" and had to be read aloud; that decision was suspended by the supreme court until the appeal itself could be considered in a more deliberative fashion. This is a request that the judiciary override internal procedural decisions in the legislature.

The most recent and still unresolved litigation concerns whether a member of the judiciary may simultaneously serve in what is alleged to be an executive branch office, that of a general in the Mississippi National Guard. Under the state constitution, interbranch dual office-holding leads automatically to forfeiture of the earlier office held.[32]

What joins the first two challenges is that in each challenge, one branch concluded that a legislative decision was not the final word. The third is different. A litigant unconnected to any branch is using the constitutional structure commandments in order to achieve other goals.

Potential violations of separate powers principles do not mean a failure of the system or a "constitutional crisis." If any erroneous power-wielding occurred, it is the kind of error that arises naturally from the checks and balances of the constitutional scheme. Whether Mississippi has been vigilant in policing alleged incursions by one branch into another's territory will be considered as to each of these controversies.

I. SEPARATION OF POWERS UNDER THE MISSISSIPPI CONSTITUTION

Conceptually, there is no reason that federal constitutional rules about the division of federal power must be applied to separation of state governmental powers. The Supreme Court has held the "Constitution does not impose on the States any particular plan for the distribution of governmental powers."[33]

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[31] *See infra* notes 387-95 and accompanying text.

[32] MISS. CONST. art. 1, § 2.

[33] Mayor of Phila. v. Educ. Equal. League, 415 U.S. 605, 615 n.13 (1974). *But see* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 133 (3d ed. 2000)

Chief Justice Rehnquist stated that "in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law, subject to the requirement that the government be republican in character."[34]

The Mississippi Supreme Court in 1873, concluded that an aspect of the "American system . . . is the distribution of powers into legislative, executive and judicial." The court further stated:

> With the adoption of the Federal constitution, arbitrary power, which had theretofore defied the rights of persons and property, was denied an existence, whether in national or state governments, . . . and there was ordained a sacred and inviolable separation of legislative, executive and judicial authority. These principles are, with us, fundamental, and cannot be disregarded by a constitutional convention any more than the legislative, executive or judicial departments of a government can exercise the powers of each other.[35]

Even if separate powers are required for ordered liberty, the boundaries must still be defined.

Separate powers and "checks and balances" are complementary but also competing concepts that together comprise the federal constitutional approach of interaction by the highest levels of government. The federal constitution does not create an obligation that state or local governments follow in lockstep. In Mississippi, for example, there is a series of inconsistent judicial precedents of whether local governments must comply with separation of powers.[36]

(stating constitution is not "wholly agnostic" on question); Michael C. Dorf, *The Relevance of Federal Norms For State Separation of Powers*, 4 ROGER WILLIAMS U. L. REV. 51, 53 (1998) (stating separation of powers concept is "an inference from specific provisions such as the Incompatibility Clause and the architecture of the Constitution itself").

[34] Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing U.S. CONST., art. IV, § 4).

[35] Lawson v. Jeffries, 47 Miss. 686, 702-03 (1873).

[36] Jordan v. Smith, 669 So. 2d 752, 758 n.4 (Miss. 1996) ("[The court has not] found an instance in which the constitutional doctrine of separation of powers has ever been applied to municipal government. On the contrary, the code is replete

Each state has followed the national model of three branches of government. However, the checks and balances among, and even within, the branches in each state may not be the same. The most obvious structural difference is in Nebraska, which is the sole state to reject the bicameral legislative model and utilize a unicameral legislature.[37] An equally important difference is that many states have numerous statewide elected officials that together constitute the executive branch of government.[38] Thus, state executive power often is not exclusively held by one official as it is at the federal executive level where executive power is lodged solely with the president.

What is an acceptable division among a state's branches is a matter of state law. A state court interpreting state requirements quite likely at some stage will examine federal requirements for analogies. The place to begin, however, is with the state's constitution.

A. Origin of Mississippi's Separation of Powers Provisions

Mississippi's first constitution, adopted in 1817, had language that with only slight, and I suggest meaningless, changes is still in effect today. It provided this:

> Art. II, § 1. The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to-wit: Those which are legislative, to one; those which are

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with instances wherein governmental functions are merged at that level."); State v. Armstrong, 44 So. 809, 809 (Miss. 1907) (finding that office of justice of peace and office of mayor were "incompatible"). An excellent review of the varying rulings through the years on county and local government application of separation of powers was provided by Justice Jim Smith in *In re Grant*, 631 So. 2d 758, 761-63 (Miss. 1994). County governments, but not municipal ones, are subject to separation principles. *Grant*, 631 So. 2d at 761-63.

[37] John Dina, *Framing a "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 963 (1999).

[38] Mississippi has eight state-wide elected officials, all of whom could be considered part of the executive branch: Governor, Lieutenant Governor, Secretary of State, Attorney General, Treasurer, Auditor, Insurance Commissioner and Agriculture Commissioner. It also has three elected Transportation Commissioners and three Public Service Commissioners.

> executive, to another; and those which are judicial, to another.[39]
>
> Art. II, § 2. No person or collection of persons, being of one of those departments, shall exercise any power, properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.[40]

Knowing the source of this language would be helpful in understanding what it means. In 1817, when Mississippi's constitutional convention delegates met in Washington, just outside of Natchez, there were several neighboring state constitutions to draw upon. The final constitution "was more like those of Tennessee, Kentucky, and Louisiana than any other states, and whole sections were borrowed from each of the three."[41] No discussion of the origin, purpose or application of the two separation of powers provisions appears in the journal or other extant records of the 1817 convention.[42]

It would appear that copies of at least the three aforementioned state's constitutions were available to the drafting committee. The most recent of the three was from Louisiana. That state's first constitution, adopted in 1812, had these provisions:

> Section 1. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another.
>
> Section 2. No person or collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein-

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[39] MISS. CONST. of 1817, art. II, § 1.

[40] *Id.* § 2.

[41] Winbourne Magruder Drake, *The Framing of Mississippi's First Constitution*, 29 J. MISS. HIST. 301, 325 (1967).

[42] Winbourne Magruder Drake, Constitutional Development in Mississippi, 1817-1865, 70 n.38 (1954) (unpublished Ph.D. dissertation, University of North Carolina) (microfilm copy on file with Mississippi Department of Archives & History).

after expressly directed or permitted.[43]

Mississippi and Louisiana's versions were almost identical.

Tennessee's first constitution was adopted in 1796, but it did not contain language such as this.[44] The next Tennessee state charter, adopted in 1834, used almost the precise words that had been adopted in Mississippi and Louisiana.[45]

The earliest of the referenced constitutions was that adopted by Kentucky in 1792. Its separation of powers provision was this:

> The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit, those which are legislative to one, those which are executive to another, and those which are judiciary to another.
>
> No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances herein expressly permitted.[46]

This provision was almost identical to that adopted twenty-five years later in Mississippi. The possible origin of the Kentucky language was later explained in a Kentucky court opinion:

> When Mr. Jefferson returned from France, the federal constitution had been adopted; and, having been appointed secretary of state, he obtained permission to go to Monticello for some months. John Breckinridge and George Nicholas paid him a visit there, and informed him that Kentucky was about to frame a constitution for herself, and that Virginia was about to permit Kentucky to become a separate and independent state. He told them that there was danger in the federal constitution, because the clause defining the powers of the departments of government was not sufficiently guarded, and that the first thing to be provided for by the Kentucky constitution should be to confine the judiciary to its powers, and the

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[43] LA. CONST. art. I, §§1 & 2 (1812).
[44] *See* TENN. CONST. art. I, § 1; art. II, § 1; art. V, § 1 (1796).
[45] *See* TENN. CONST. art. II, §§ 1 & 2 (1834).
[46] KY. CONST. art. I, cl. 1 & 2 (1792).

> legislative and executive to theirs. Mr. Jefferson drew the form of the provision, and gave it to Nicholas and Breckinridge; and it was taken by Nicholas to the convention which met at Danville, and there presented,—Breckinridge not being present at the convention. There was much discussion and dissent when the article was offered, but, when its author was made known, the respect of Kentucky for the great name of Jefferson carried it through, and it was at once adopted.[47]

An original source confirming this judge's explanation has not been discovered. It is true that no explicit language appeared in the United States Constitution regarding branches of government or maintaining separate powers. Instead, the holders of legislative, executive and judicial powers are described, but the overall conceptual framework of separate branches is never identified.

Thomas Jefferson did not attend the Constitutional Convention in 1787 because he was on diplomatic missions in Europe.[48] Jefferson was unenthusiastic about the new document when he wrote, "I find myself nearly a neutral. There is a great mass of good in it, in a very desirable form, but there is also, to me, a bitter pill or two."[49] In the contemporaneous writings discovered, Jefferson primarily objects to the absence of a bill of rights and the absence of any limit on the number of terms that a president could serve.[50] A review of his writings in the 1787-1789 period did not disclose any letter criticizing the separation of powers approach.[51] Interestingly, John Adams, the man who was then, and after an intervening period of strong political differences would again be a close friend, wrote Jefferson about the need for better clarity in this regard. Shortly before Adams was sworn in as the country's first vice

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[47] Comm'rs of Sinking Fund v. George, 47 S.W. 779, 784-86 (Ky. 1898) (DuRelle, J., dissenting).

[48] ROBERT ALLAN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 107 (1955).

[49] Jefferson [from Paris] to Edward Carrington (Dec. 21, 1787) *in* 12 THE PAPERS OF THOMAS JEFFERSON 445-47 (Julian P. Boyd ed. 1955).

[50] Jefferson to Madison (Dec. 20, 1787), *supra* note 49, at 440-41.

[51] Reviewed were 12-15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49.

president, he wrote for Jefferson's thoughts about necessary constitutional amendments. "That greatest and most necessary of all Amendments, the Separation of the Executive Power, from the Legislative," Adams wrote, "seems to be better understood than it once was. Without this our Government is in danger of being a continual struggle between a Junto of Grandees, for the first Chair."[52] Jefferson responded from Paris two months later—no electronic facsimile transmissions in 1789—without addressing the amendment issue.[53]

Still, regardless of whether any delegate visited with Jefferson just before the Kentucky convention, the "Sage of Monticello" had at a different time written something identical to the provision first adopted by Kentucky. In 1783, Jefferson drafted a proposed new Virginia constitution. It included this opening provision:

> The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy; to wit, those which are legislative to one, those which are judiciary to another, and those which are executive to another. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly permitted.[54]

The 1776 Virginia constitution, which was not replaced until 1830, had similar language:

> The legislative, executive, and judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them at the same time. . . .[55]

Though the concepts are similar, it was Jefferson's lan-

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[52] Adams to Jefferson (Mar. 1, 1789), 14 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 599.

[53] Jefferson to Adams (May 10, 1789), 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 117.

[54] Draft of a Constitution for Virginia, 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 306 n.10.

[55] VA. CONST. cl. 2 (1776).

guage that was carried into frontier territories. Kentucky's 1792 delegates might have had a copy of Jefferson's *Notes on the State of Virginia*. Several editions were printed before 1792, with the first American edition being printed in Philadelphia in 1788.[56] It contained this draft Virginia constitution as an appendix.[57] Jefferson may also have sent the draft language to the Kentucky convention through Nicholas as asserted in the much later Kentucky judicial opinion. In addition, a prominent Virginia politician named John Mason Brown who moved to the part of Virginia out of which Kentucky would be carved in 1792 asked James Madison in 1788 to send him "remarks upon Jefferson's plan of Govt. denoting such alterations as would render it more applicable to the District of Kentucky."[58] There were many sources for the language potentially available to the Kentucky convention.

The 1817 Mississippi document was drafted by a twenty-one-person committee chaired by George Poindexter, who was called the "leading man of the convention."[59] He was a lawyer and for the four years leading up to the convention had been the territorial judge.[60] Poindexter was made chairman of the

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[56] A search of the University of Virginia library's on-line catalog revealed several editions of 1784, 1785, 1787, and 1788. Until the Philadelphia edition, they had been printed in Paris, London and Leipzig. *See* http://virgo.lib.virginia.edu/. The 1788 edition is called the "first American edition," and has this publishing information: "Philadelphia, Printed and sold by Prichard and Hall, in Market Street, 1788." The use of any edition by delegates is only conjecture.

[57] Linda Lester, Reference Librarian at the University of Virginia, and Gayle Cooper of Special Collections, confirmed by electronic mail on May 3, 2002, that the draft constitution appears in that library's copy of the 1788 Philadelphia edition of Jefferson's *Notes*, Appendix 2, at pages 228-241, and the separation of powers provision quoted above is at page 229.

[58] *See* 6 THE PAPERS OF THOMAS JEFFERSON, *supra* note 49, at 283. A Madison response was not found.

[59] Drake, *supra* note 42, at 65, 98.

[60] Poindexter was the territory's next to last Congressional delegate and its last territorial judge; he was also the state's first United States Representative, its second governor and later a United States Senator. *See generally* MARK SWEARINGEN, THE EARLY LIFE OF GEORGE POINDEXTER: A STORY OF THE FIRST SOUTHWEST (1934). At least one direct descendant continues to perform valuable service to the state: George Poindexter Hewes, long a member of one of Mississippi's most prominent law firms, Brunini, Grantham, Grower & Hewes and beginning in 2002, the director of the Stewpot Community Services charitable

drafting committee, and largely due to that role, made one-fourth of all the motions at the convention.[61] Poindexter and many other delegates must have had access to a variety of legal materials including the constitutions of neighboring states. Poindexter received his legal training in Virginia, and it is not overly conjectural that he would have been exposed to Jefferson's *Notes on the State of Virginia* in the course of his studies.

The only differences between Jefferson's proposal as printed in *Notes on the State of Virginia* and what was adopted in Mississippi are some additional commas and the order in which the three branches of government are referenced. The current 1890 Mississippi Constitution made one deletion and one addition to this original phrasing when the present constitution was adopted. As will be explained later, these changes do not affect the meaning of the provision, though a penalty in limited situations was added. Thus, the language of Mississippi's separation of powers provisions in effect in the twenty-first century is almost verbatim to that written by Thomas Jefferson at least by 1783. Whether its meaning has been transformed is the next question.

B. Jefferson, Montesquieu and the Anti-Federalists

What the words originally meant is our starting point. For purposes of what the delegates in 1817 were implementing by adopting these provisions, does it matter what Jefferson meant when he wrote the phrases? What should be significant is what the language itself means. Yet just what Jefferson sought to accomplish should not be ignored. Largely that is because of the man himself. He was not only a founder of the republic but also of a political party that dominated the country for decades, whose stature alone was allegedly sufficient in 1792 to convince the Kentucky delegates of the propriety of the language. None of the delegates to the Mississippi Constitutional Convention of

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organization. Clay Hardon, *Hewes New Stewpot Leader*, CLARION-LEDGER (Jackson, Miss.), Nov. 26, 2002, at 1B.

[61] J.F.H. CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY, & STATE, WITH BIOGRAPHICAL NOTICES OF EMINENT CITIZENS 155-56 (1880).

1817 declared themselves as Federalists or Anti-Jeffersonians.[62] Poindexter, chairman of the drafting committee, was a Jeffersonian Republican who had been elected to the territorial assembly and as territorial delegate under that party banner; with statehood he became Mississippi's first congressman and second governor as a Jeffersonian.[63] Thus, even if the delegates were not all immersed in the nuances of Jeffersonian philosophy, it would appear few successful politicians in frontier Mississippi were publicly inimical to it.

Jefferson's views on the proper division of powers were expressed in many different documents. In his opinion, Virginia's 1776 constitution gave too much power to the legislature: "The concentrating [of] these [powers of government] in the same hands is precisely the definition of despotic government.[64] He wrote of the importance of governmental powers being diffused:

> An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.[65]

What Jefferson thought was necessary for true separation of powers is explained by his criticisms of the Virginia constitution. When the 1776 Virginia convention had finished its work, Jefferson said that it had allegedly

> laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between

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[62] Robert V. Haynes, *The Road to Statehood*, *in* 1 HISTORY OF MISSISSIPPI 217, 247 (Richard Aubrey McLemore ed., 1973).

[63] Suanna Smith, George Poindexter: A Political Biography 6-7, 14, 25-26, 50, 64 (1980) (unpublished Ph.D. dissertation, University of Southern Mississippi) (on file with author).

[64] Thomas Jefferson, *Notes On the State of Virginia*, Query XIII, *reprinted in* THOMAS JEFFERSON, WRITINGS 245 (Merrill D. Peterson ed., 1984).

[65] *Id.*

> these several powers. The Judiciary and executive members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it.[66]

It would appear that Jefferson conceived of some manner in which the executive and judicial branches could provide for their own "subsistence." Perhaps the courts could charge fees sufficient to pay their costs and salaries, while some other means could be employed by the executive. In addition, members of one branch choosing the members of another branch violated his early conceptions of proper separation. At least at the time of the *Notes*, Jefferson likely would not have thought powers were suitably separate if judges were nominated by the executive and confirmed by one house of the legislature. Of course, that is what the 1787 federal constitution provided.

Jefferson was far from being just a lone voice crying in the wilderness. The debate over ratification of the United States Constitution from 1787-1788 was intense. It often was conducted at a level of theory that is not encountered in public discussions in modern times. The principal recognized authority on the original meaning of the Constitution, the *Federalist Papers*, collected the writings in favor of the new constitution prepared by "Publius," the pseudonym employed jointly by Alexander Hamilton, John Jay and James Madison. It did not contain similar writings by other proponents,[67] nor except in relief, did it demonstrate the views of those opposing ratification.

The Supreme Court refers to the *Federalist Papers* as one of the "sources we have usually regarded as indicative of the original understanding of the Constitution."[68] Justice Antonin Scalia says he does not consider the writings useful as a reflection of the personal intent of the actual drafters of the constitution.[69] Instead, he examines the *Federalist Papers* "because their writings, like those of other intelligent and informed peo-

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[66] *Id.*

[67] *See* FRIENDS OF THE CONSTITUTION: WRITINGS OF "OTHER" FEDERALISTS, 1787-1788 (Colleen A. Sheehan & Gary L. McDowell eds., 1998).

[68] Printz v. United States, 521 U.S. 898, 910 (1997).

[69] ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (Amy Gutnam ed., 1997).

ple of the time, display how the text of the Constitution was originally understood."[70] That is true even though it is undeniable that the *Federalist Papers* were written to sway public opinion. Potentially unpopular effects were downplayed or denied. The most notable example was Hamilton's assertion as *Publius* that the "necessary and proper clause" should be read narrowly.[71] Yet as secretary of the treasury under President Washington, he ignored the import of that reasoning and wrote a detailed legal opinion to the President explaining that the national government is "sovereign with regard to its proper objects" and would permit congressional chartering of a national bank, even though chartering was not incidental to any specific power.[72] Jefferson himself would show that practicality overcame strict adherence to philosophy when as president he agreed to the purchase of Louisiana from France, even though no enumerated power had referred to acquiring additional territory by purchase.[73]

Out of this entire array of views, can a Jeffersonian explanation of properly separated constitutional government be found? As already noted, Jefferson called himself virtually neutral on the new document, finding much to favor as well as to oppose. Indeed, if the Kentucky judicial writer was correct in 1898, the separation of powers provisions employed by Kentucky in 1792, were to correct what Jefferson believed was a defect in the five-year old federal Constitution. The *Federalist Papers* would not likely be the best explanation of Jeffersonian thought on separation of powers.

What then of the opponents of ratification? Their extensive commentaries on the federal Constitution may be more enlightening here than those of Hamilton, Jay and Madison. Unlike the *Publius* writings favoring ratification, no single collection of writings for the opponents of ratification captures the essence

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[70] *Id.*

[71] THE FEDERALIST NO. 33 (Alexander Hamilton).

[72] FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 278 (1985); JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 87-88 (1999).

[73] LYNCH, *supra* note 72, at 222.

of the relevant arguments. One reason for that almost certainly is that unlike the Federalists, whose common goal was to support what had been adopted in the Constitution, the Anti-Federalists had a range of views whose common thread was a conviction that the constitution drafted in Philadelphia should not yet be ratified, if it ever should.[74]

The most thorough scholar on Anti-Federalist writings pointed out that some Anti-Federalists supported the Constitution but only if there first were amendments, while some Federalists supported ratification but wanted almost the same amendments in due course afterwards.[75] The differences between the two contending forces were not the differences of monarchists and democrats, or autocrats and anarchists. This was, after all, the aftermath of the American Revolution and not the French Revolution. In America, their "common ground" is what "explains, to a large extent, the relatively unclear line between the two camps and the diversity within each of them."[76]

Anti-Federalist thought was significant in its effect. It did not block ratification, but its concerns were addressed. Twelve amendments were proposed to the states by the first Congress that were direct results of the Anti-Federalist criticisms. It would be fair to call these twelve the Anti-Federalist Amendments, though they were written largely by James Madison.[77] Eight of them recognized individual rights as against Congressional power. Another assured that the enumeration of rights was representative and that others were neither denied nor disparaged. The nature of the constitution, that it was one of delegated powers, was made clear by another amendment.[78] In 1992, two hundred and one years after the first ten amendments were ratified, what had been the second amendment proposed by Congress finally was approved by a sufficient number of states: an increase in the compensation of members of

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[74] 1 THE COMPLETE ANTI-FEDERALIST 5 (Herbert J. Storing ed., 1981).

[75] *Id.*

[76] *Id.* at 5-6.

[77] H. Richard Uviller & William G. Merkel, *The Second Amendment in Context: The Case of the Vanishing Predicate*, 76 CHI.-KENT L. REV. 403, 498 (2000).

[78] U.S. CONST. amends. I-X.

Congress could not take effect until after an election had intervened.[79]

The original first amendment, the only one of the twelve submitted to the states in 1789 never to be ratified, was also important to Anti-Federalist objections to the Constitution. Its premise was that only a House of Representatives with a large number of members was likely to lead to election of individuals from the ranks of freemen below the wealthy and well-born. The Anti-Federalists conceded that the tiny Senate would be only for America's aristocrats. Thus they wanted assurances of significant numerosity in the House. The first First Amendment provided just that:

> Article the first
>
> After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons.[80]

There were only 65 members in the first House of Representatives, the initial number set by the Constitution until the first census. After that, there could not be less than one member per state nor more than one for every 30,000 in the population.[81] The failed first amendment *required* one representative for every 30,000 persons. For the country's present population of 275 million, the minimum number would have been 200 members, less than the 435 members now serving. A maximum of one for every 50,000 in the population would have capped

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[79] U.S. CONST. amend. XXVII.

[80] II DOCUMENTARY HISTORY OF THE CONSTITUTION 321-24 (1894).

[81] U.S. CONST. art. I, § 2, cl. 3.

the House at an eye-popping 5,500 members.

A minimum size for the House is an important example of the same doubts about reliance on rulers' virtue that led to insistence for more absolute separation of powers. Patrick Henry pointed out that Congress had the right to allocate only one representative per state.[82] In fact, some Federalists were pleased that the new constitution would "prolong the traditional kind of elitist influence in [national] politics that social developments, especially since the Revolution, were undermining."[83] Recognizing and rejecting that tendency, the Anti-Federalist Melancton Smith, at the New York ratification convention, spoke at length on the need for broader citizen membership: "the number of representatives should be so large, as that while it embraces men of the first class, it should admit those of the middling class of life."[84] The abilities of the wealthy and well-educated are necessary, balanced by "a sufficient number of the middling class to control them."[85] A small membership in the House would create "a great danger from corruption and combination."[86] Smith argued that we "ought to fix in the Constitution those things which are essential to liberty. If any thing falls under this description, it is the number of the legislature."[87]

In summary, the Anti-Federalists doubted that benefits outweighed risks in the strong national government that would be formed by ratification. The "general presumption that rulers will govern well [was] not a sufficient security" for the Anti-Federalists to risk their lives, fortunes, and sacred honor.[88]

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[82] Speeches of Patrick Henry in the Virginia State Ratifying Convention (June 5, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 207, 213-14.

[83] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 513 (1969).

[84] Speeches by Melancton Smith, Delivered in the Course of Debating by the Convention of the State of New York on the Adoption of the Federal Constitution (June 21, 1788), *in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 148, 157.

[85] *Id.* at 160.

[86] *Id.* at 159.

[87] *Id.*

[88] Letters from Cato to Citizens of New York (Sept. 1787-Jan. 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 101, 117.

The Anti-Federalist reservations were that they wanted individuals and states better protected within the constitution from the tyranny of the few. These arguments led to eight amendments that assured citizen's rights, two amendments that declared constitutional premises and two that encouraged congressional virtue. Eleven of the twelve were adopted.

If we look to Anti-Federalist thought as a possible close approximation to what Jefferson was addressing through his draft of a separation of powers provision, we should not expect that a revolutionary difference with the Federalists will emerge. There was large agreement about the nature of government and the people who should be its voters and its officials, but there were differences about what sort of protections were needed to assure success. The Anti-Federalists have been called "men of little faith."[89] They worried that the liberties so recently and narrowly won in war would be overawed by a new and powerful national government. As the Anti-Federalist *Centinel* wrote, "if the United States are to be melted down into one empire, it becomes you to consider . . . whether [that one empire] would be practicable, consistent with freedom."[90] *Centinel* referred to the country, the United States, in the then-common manner as a plural word—if the "United States *are* to be melted down." The Anti-Federalists were fearful that the identity, specifically the sovereignty of these united states would be smothered by the new constitution. This lack of faith led Anti-Federalists to doubt and want more than the Constitution offered.

An Anti-Federalist who appeared to write with a Jeffersonian spirit on separation of powers used the pseudonym "William Penn." He argued that "no free government can ever subsist" without a division of powers:

> The first and most natural division of the powers of government are into the legislative and executive branches. These two should never be suffered to have the least share of each

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[89] Cecilia Kenyon, *Men of Little Faith: The Anti-Federalists On the Nature of Representative Government*, 12 WILLIAM & MARY Q. 3 (1955).

[90] Letters from Centinel to the Freemen of Pennsylvania (Oct. 1787-Apr. 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 136, 138.

> others jurisdiction, or to intermeddle with it in any manner. For which ever of the two divides its power with the other, will certainly be subordinate to it, and if they both have a share of each others authority, they will be in fact but one body; their interest as well as their powers will be the same, and they will combine together against the people.[91]

This appears Jeffersonian because of its absolutism. William Penn criticized the constitution for providing an executive veto over congressional enactments. Yet the author acknowledged that in many of the united states this executive veto was already accepted despite that the doctrine of separation of powers was "well understood and admitted without controversy . . . ."[92] The Massachusetts constitution was quoted: "The executive shall never exercise the legislative and judicial powers, or either of them, to the end it may be a government of laws and not of men."[93] John Adams was the likely author of that inspiring Massachusetts provision.[94] That suggests how nearly universal was the use of extremely broad language of principle, which was then followed by accommodations in practice.

The federal constitution proposed not rigid separation of powers but something quite different. Along with identifiable "magistracies" for the three branches of government, there were to be limited intrusions by each into the operation of the others in the forms of checks and balances. This was "mixed government," the very point made by the Supreme Court in *Buckley v. Valeo*: "these three governmental powers were not entirely separate from one another in the proposed Constitution."[95] Though Anti-Federalists could write with absolutes in criticizing this mixture, they too used rhetoric that went beyond their meaning. It would appear that the Anti-Federalists wanted less interaction between the departments of govern-

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[91] Essays from William Penn to the Citizens of the United States (Jan. 2, 1788), *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 171, 172-73.

[92] *Id.* at 173.

[93] *Id.*

[94] ELLEN E. BRENNAN, PLURAL OFFICE-HOLDING IN MASSACHUSETTS, 1760-1780, 137-39 (1945).

[95] Buckley v. Valeo, 424 U.S. 1, 120-21 (1976).

ment but accepted that total separation was not possible. A disconnect between rhetoric and reality may well infect the polemics of every age.

Even if perfection in applying principle to practice was not attained, there was still a revolution of ideas occurring. Stating that all powers exercised by the civil government are to be divided into executive, legislative and judicial was part of the revolution in government implemented in the late 1700s in America. The tripartite division of government prior to that time was into three forms: the rule by a single person, or a monarchy; rule by the few, which was an aristocracy; and rule by the many, or a democracy. Monarchy allegedly brought order and energy; aristocracy delivered wisdom; democracy brought on honesty and virtue.[96] It was combining the strengths of those three forms that was said to have been accomplished in the British system. It was composed of those three parts in the person(s) of the King, the Lords, and the Parliament.[97] Under that system, the only power from the people was given to Parliament. The King and the House of Lords had no democratic source for their powers. These three components of British government did not exercise separate powers, as the Parliament had broad executive powers such as control of the military and oversight of the ministries through the prime minster; judicial power was shared by the Houses of Lords and of Commons, as well as the King's courts.[98]

The most significant herald of the new concept of separation of powers was the French Baron de Montesquieu. A judge, scientist, novelist, historian and European traveler, he spent twenty years working on the *Spirit of the Laws*, finally completed and published in 1748. The book was extraordinarily influential in the era of the constitutional founders. Montesquieu provided the intellectual origins for a different understanding of the forms of governments and their optimal operation. He "divided the three forms of government in a thoroughly unorthodox fashion. [The three forms] were, he de-

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[96] *See* WOOD, *supra* note 83, at 198.
[97] *See* WOOD, *supra* note 83, at 206.
[98] *See* MCDONALD, *supra* note 72, at 82.

clared, republics;" monarchies, "in which a single person governs by fixed and established laws;" and despotisms, "in which a single person directs everything by his own will and caprice."[99]

Montesquieu then explained why legislative, executive and judicial powers needed to be maintained by separate departments of government. His original intent may not have remained an anchor to the American use of the principles, but that intent does help with understanding the philosophical content of the doctrine:

> Montesquieu saw three distinct forms of law, each corresponding to a separate governmental function. The law of nations consists of the power to promote public security, conduct foreign relations, and declare war. It rests with the executive. The political law consists of the power to make temporary or permanent laws and rests with the legislature. Finally, the civil law consists of the power to adjudicate civil and criminal matters and rests with the judiciary.[100]

The fact that there are three identifiable powers does not naturally lead to the principle that these forms must be assigned to different components of the government. Montesquieu's conclusion that they must be was in order to prevent tyranny.

> When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence of an oppressor.[101]

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[99] *See* MCDONALD, *supra* note 72, at 81.

[100] Matthew P. Bergman, *Montesquieu's Theory of Government and The Framing of the American Constitution*, 18 PEPP. L. REV. 1, 14-15 (1990) (footnote omitted).

[101] MONTESQUIEU, THE SPIRIT OF LAWS 202 (David Wallace Carrithers ed.

Montesquieu not only influenced the founders, his writings—and especially the quotation just given—continues at least to be referenced in modern times:

> A close reading of many of the Supreme Court's most significant decisions reveals that Montesquieu's influence prevails some two hundred and forty years after publication of his *The Spirit of the Laws*. Montesquieu was cited by the Supreme Court in both *Bowsher v. Synar*, which struck down the Gramm-Rudman deficit reduction bill as an unconstitutional delegation of legislative power, and *Buckley v. Valeo*, a case upholding the constitutionality of the Federal Election Commission. The Supreme Court also invoked Montesquieu's authority in *I.N.S. v. Chadha*, a decision that struck down the legislative veto of administrative decisions.[102]

From these origins in theory, a government in practice had to be created. The Anti-Federalist *Centinel* attacked balanced government by describing it unbelievingly as "three balancing powers whose repelling qualities are to produce an equilibrium of interests, and thereby promote the happiness of the whole community."[103] A structural design that makes each branch's selfish interest serve the public good through the force of the competing selfish interests of the other branches would be too intricate and unreliable. *Centinel* did not believe any structure could be depended upon to create such a felicitous result from such deleterious forces. The mixture of powers appeared alien. "An Officer of the Late Continental Army" said that legislative and executive "powers are not kept separate as every one of the American constitutions declares they ought to be; but they are mixed in a manner entirely novel and unknown . . . ."[104] The answer of many Anti-Federalists was not simply a more pristine separation of powers, but smaller and simpler government in which the national government was weak and the states

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1977) (1748).

[102] Bergman, *supra* note 100, at 2 (footnotes omitted).

[103] *See* 2 *The Complete Anti-Federalist*, *supra* note 74, at 138.

[104] Letter by an Officer of the Late Continental Army (Philadelphia) (Nov. 6, 1787), *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 92, 93.

truly sovereign.[105] Anti-Federalist objectors at the Pennsylvania ratification convention proposed an amendment to assure separation:

> That the legislative, executive, and judicial powers be kept separate; and to this end that a constitutional council be appointed, to advise and assist the president, who shall be responsible for the advice they give, hereby the senators would be relieved from almost constant attendance; and also that the judges be made completely independent.[106]

Purer separation was one of the remedies sought by Anti-Federalists. *Centinel* quoted Montesquieu regarding the destruction of liberty when legislative and executive powers are combined in the same person: "The chief improvement in government, in modern times, has been the complete separation of the great distinctions in power . . . ."[107] More realistic was the New Yorker *Brutus* who wrote that it was "impracticable, perhaps, to maintain a perfect distinction between these several departments . . . ."[108] Still, "it is requisite that the different departments of [government] should be separated and lodged as much as may be in different hands."[109] *Brutus* worked through his difficulty of defining the proper mixture by stating that the separation "should only extend to certain leading features in a government."[110] He rejected the notion that the senate should share the executive power of appointing officers, which the Constitution granted to it in the confirmation power.[111] *Brutus* opposed the idea that courts would have to ig-

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[105] Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention (1787), *in* 1 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 54, 55-56.

[106] The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents (Dec. 18, 1787), *in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 143, 151.

[107] Letter of Centinel to the People of Pennsylvania (Oct. 1787-Apr. 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 143, 151.

[108] Essay of Brutus XVI (Apr. 10, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 358, 442.

[109] Essay of Brutus XVI (Apr. 10, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 442.

[110] Essay of Brutus XVI (Apr. 10, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 445-46.

[111] *See generally* Essay of Brutus XVI (Apr. 10, 1788), *in* 2 THE COMPLETE

nore ("not take notice of") and even void statutes that violated the court's understanding of the Constitution.[112]

The "Federal Farmer," one of the most prolific and insightful of the Anti-Federalist writers, would allow these exceptions to separation:

> It is a good general rule, that the legislative, executive, and judicial powers, ought to be kept distinct; but this Act, like other general rules, has its exceptions; and without these exceptions we cannot form a good government, and properly balance its parts, and we can determine only from reason, experience, and a critical inspection of the parts of the government, how far it is proper to intermix those powers. Appointment, I believe, in all mixed governments, have been assigned to different hands . . . . It has been thought adviseable by the wisest nations, that the legislature should so far exercise executive and judicial powers as to appoint some officers, judge of the elections of its members, and impeach and try officers for misconduct—that the executive should have a partial share in legislation—that judges should appoint some subordinate officers, and regulate so far as to establish rules for their own proceedings. Where the members of the government, as the house, the senate, the executive, and judiciary, are strong and complete, each in itself, the balance is naturally produced . . . and we have less need to be anxious about checks, and the subdivision of powers.[113]

These various observations reveal differences among the Anti-Federalists as to the details, but a preference for more, rather than less, separation of powers. Some Anti-Federalists would have amended the constitution to provide a specific declaration regarding separation. *Cincinnatus* wanted a declaration of rights that would state that "these powers should be forever separate and incommunicable," and the "frame of the proposed constitution, should have had that separation reli-

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ANTI-FEDERALIST, *supra* note 74, at 446; U.S. CONST. art. II, § 2, cl. 2.

[112] Essay of Brutus XVI (Apr. 10, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 446.

[113] Letters From the Federal Farmer, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 308-09.

giously in view, through all its parts."[114] Like so many declarations of the period, though, absolutist principles inevitably gave way to practical exceptions. The differences between the framers and the objectors on separation of powers are only at the margins: the Anti-Federalists wanted a proclamation in the Constitution, followed by a little more separation, a little less mixing. Very few in the debate believed that complete separation was achievable or desirable.

Mississippi's constitution was created by political descendants of those who were not completely enamored with what had been created by the founding fathers in Philadelphia in 1787. We should not interpret the 1817 constitution or its sucessors through an expectation of pure separation of powers. To do so would misconceive the philosophical parentage of the state's constitution drafters.

C. Amendment to and Interpretation of Mississippi's Provisions

It was thirty years after this seminal debate in American constitutional philosophy that Mississippi undertook to write its own state charter. What was true in 1787-1788 remained valid as the decades passed—advocates could speak the absolutes of Montesquieu yet then seemingly ignore the ramifications of those ideals when forming the details of an actual government. Madison noted during the ratification debate as to separation of powers principles in state constitutions, "notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct . . . ."[115] Such variations between initial pronouncements and ultimate provisions did not lessen in the ensuring decades.

The Mississippi provisions have already been quoted. A reiteration might be useful.

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[114] Essays of Cincinnatus, New York Journal (1787) *in* 6 THE COMPLETE ANTI-FEDERALIST, *supra* note 74, at 21.

[115] WOOD, *supra* note 83, at 550.

> Art. II, § 1. The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to-wit: those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.
>
> Art. II, § 2. No person or collection of persons, being of one of those departments, shall exercise any power, properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.[116]

The first section allocates powers into separate departments, while the second then reaches inside the departments to place fetters on people. In effect, section one creates a structure based on the theory of separate powers. Section two then proclaims that function follows theory, but also that practical exceptions are stated in the constitution itself.

In the three later Mississippi constitutions, that language has remained, with adjustments.

The second constitution was adopted in 1832. It changed the order in which the departments were listed in the first section, perhaps to conform to the order in which the legislative, executive and judicial departments were described in the constitution.[117] The comma separating "power" and "properly" was removed in the second section.[118] I find no interpretive significance here.

The 1869 constitution drafters were bolder, but barely. They replaced "body of magistracy" simply with "magistracy" and altered the phrase "being of one of those departments" to "being one of these departments."[119] Semi-colons replaced commas to divide each clause that referred to a branch at the end of section one.[120] Again, the meaning remained constant.

The most recent constitution, adopted in 1890, adjusted the

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[116] MISS. CONST. OF 1817, art. II, §§ 1 & 2.
[117] MISS. CONST. OF 1832, art. II, §§ 1 & 2.
[118] *Id.*
[119] MISS. CONST. OF 1869, art. III, §§ 1 & 2.
[120] *Id.*

punctuation of section one. More importantly, added to section two was a specific prohibition against holding office in two different branches and a remedy for the violation.[121] The current constitutional provisions are these:

> Section 1.
> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.
>
> Section 2.
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[122]

The first section appears unaffected by the slight rephrasings. The second section continued to bar the exercise of one branch's powers by a "person or collection of persons" in another branch, but removed the exception for "instances hereinafter expressly directed or permitted."[123] What was added was a prohibition on a specific category of dual office-holding, namely, holding offices in two different departments of government.[124] That a person may without constitutional penalty be holding multiple offices in one department is implicit in the phrase that "any *and all offices* held by the person" in a department are vacated only when an office in a different department is accepted.[125] This was not a blanket rejection of serving in two state or local offices but only barred holding offices in different departments.

The two parts of the second section are related but not

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[121] MISS. CONST. of 1890, art. I, §§ 1 & 2.
[122] *Id.*
[123] *Id.* § 2.
[124] *Id.*
[125] *Id.* (emphasis added).

necessarily identical in their operation. Their applications are not coterminous unless belonging to one department and exercising power properly belonging to another requires that a person be holding an "office" in two different departments. More reasonably, the first sentence of section two is a broad prohibition similar to the entirety of section one. The legislature, for example, might erroneously grant to a "collection of persons, being one or belonging to one of these departments," powers that are later held to be "properly belonging to either" of the other branches.

For example, in *ex rel R.G.*, at issue was a statute that gave to youth court judges the executive power to select and supervise school attendance officers.[126] The youth court judge was at all times holding an office only in the judicial branch, but had been given these limited powers of the executive branch. The judge did not forfeit his office; it was the power that was forfeited when the statutory provision was declared unconstitutional.[127] To violate the second sentence of section two requires the holding of two separate offices in two separate branches.[128]

Nothing appears in the cursory official journal of the 1890 constitutional convention explaining the insertion of the phrase on forfeiture of office. The more thorough reporting in some contemporaneous newspapers also does not refer to speeches or other forms of explanation for the new language.[129] Why was this form of dual office-holding made explicitly unconstitutional for the first time? All dual office-holding was not barred. Even today, litigation occurs to decide whether two offices are ones that may be held by the same person.[130] What may have con-

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[126] *Ex rel.* R.G., 632 So. 2d 953, 954 (Miss. 1994).

[127] *Ex rel R.G.*, 632 So. 2d at 954.

[128] *Id.* at 958.

[129] A Memphis newspaper was significantly more thorough than any discovered Mississippi paper on the proceedings at the convention. An examination of the Memphis *Appeal*, the Jackson *Clarion-Ledger* and the Brookhaven *Ledger* (hometown paper of Robert H. Thompson, the chairman of the Legislative Committee that wrote this provision), failed to uncover any discussion whatsoever of the provision, just the fact of its presentation and adoption.

[130] *See, e.g., In re* Grant, 631 So. 2d 758, 761-64 (Miss. 1994).

tributed to the provision, like much else in the 1890 constitution, was reaction to perceived "abuse of political authority at all levels of government" during Reconstruction from 1865-1875.[131] The Reconstructio experience will be examined next.

One aspect of the multiple office-holding phenomenon was addressed by President Ulysses Grant in 1873. After finding that the practice was widespread, he decreed that those holding federal civil office who acquired a state or local office would automatically relinquish the federal position.[132] A few days later, a clarifying order was issued that the president's previous order did not apply to service in the militia.[133] The Jackson *Weekly Clarion*, a Democratic newspaper, said that the original order would "interfere with a custom peculiar to carpet-baggers, and with what they hold to be a vested right to occupy as many places as they can appropriate."[134] Allegedly, federal postmasters responded to the order by resigning their offices only after arranging appointment of their wives as successors.[135] Examples were said to be postmasters William Price in Grenada and N.G. Gill in Holly Springs, who were also respectively a state senator and representative from their counties.[136] The United States Marshall for the Northern District of Mississippi, James H. Pierce, was also a state senator.[137]

Two weeks after President Grant's order prohibiting simultaneous federal and state office-holding, a bill was introduced

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[131] William F. Winter, *The Legislature*, *in* YESTERDAY'S CONSTITUTION TODAY 25 (Edward H. Hobbs ed., 1960); *see also* Eric Charles Clark, The Mississippi Constitutional Convention of 1890: A Political Analysis 135 (1975) (unpublished M.A. thesis, University of Mississippi) (on file with author). The convention delegates were not indignant about the abuses of the Democratic revolution and redemption in 1875-1876, but they were embarrassed. This will be discussed below.

[132] Ulysses S. Grant, Executive Order (1873), *reprinted in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, at 4172-73 (James D. Richardson ed. 1911).

[133] *Id.* at 4173-74.

[134] *Duplicated Office-Holders*, WEEKLY CLARION (Jackson, Miss.), Jan. 23, 1873, at 2.

[135] WEEKLY CLARION (Jackson, Miss.), Apr. 10, 1873, at 2.

[136] WEEKLY CLARION (Jackson, Miss.), Apr. 10, 1873, at 2, col. 2; MISSISSIPPI OFF. & STAT. REGISTER 203, 232 (1917).

[137] *One of the President's Men*, WEEKLY CLARION (Jackson, Miss.), Feb. 6, 1873, at 2; MISSISSIPPI OFF. & STAT. REGISTER 203 (1917).

in the Mississippi senate "to prohibit persons from holding and exercising the functions of more than one public office in this State."[138] An amendment was accepted that stated the bill "shall not be so construed as to apply to . . . officers of the militia, or to cases where the same is expressly provided by law."[139] The bill died in committee.[140]

Concurrent state offices were held by Joshua S. Morris. He was elected Attorney General in 1869 and served from 1870 to 1874 while at the same time he served as the law reporter, pursuant to supreme court appointment.[141] The law reporter had a six-year term; he was required to prepare a synopsis of each opinion, summarize each counsel's brief, and publish all of the court's opinions.[142] For this, he was paid seven dollars per page and would also receive the proceeds from sales.[143] Morris was said to have earned over $38,000 in 1872 as reporter and also received about $2,700 as attorney general.[144]

Multiple office-holding arose during Reconstruction in part because of the dearth of Republicans to fill the multitude of offices. "In communities where there were not enough competent Republicans to go around, one man sometimes held several offices, or the offices were distributed among the members of a

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[138] 1873 MISS. SEN. J. 1198 (1873) (Senate Bill 65).

[139] *Id.* at 1292.

[140] *Id.* at 1498-99 (recommitted to committee, from which it did not emerge).

[141] Morris was Attorney General from 1870-1874. MISSISSIPPI OFF. & STAT. REG. 34 (2000-2004). He was Law Reporter from the May 1870 through the April 1873 Terms of Court. *See* 43 Miss. iii (1870) (Morris first shown as reporter for the "spring 1870 term); 48 Miss. iv (1873) (last indication that Morris was reporter, for the April 1873 term); 49 Miss. v (1873) (indicates that Harris & Simrall were reporters for the October 1873 term).

[142] *See An Enormous Grab—$38,143*, WEEKLY CLARION (Jackson, Miss.), Feb. 13, 1873, at 2; *The Compensation of the Law Reporter*, WEEKLY CLARION (Jackson, Miss.), Feb. 13, 1873, at 2.

[143] *See generally* MISS. CODE ANN. § 182-186 (1871). The law reporter was appointed by the supreme court for a six year term. MISS. CODE ANN. § 435 (1871). A later supreme court chief justice stated that when Morris was named it "was then the rule" that the attorney general act as reporter. V.A. Griffith, *Mississippi Reports and Reporters*, 22 MISS. L.J. 37, 42 (1950).

[144] *An Enormous Grab–$38,143*, *supra* note 142, at 2; *The Compensation of the Law Reporter*, *supra* note 142, at 2. This appeared to be the newspaper's calculation and was not necessarily accurate. The annual salary of the attorney general was $2,700 in 1874. 1874 Miss. Laws ch. 13.

family."[145] One author referred to a "Methodist preacher from the North," who simultaneously served as a state senator, public printer of his district and postmaster; his nephew was superintendent of education and deputy collector of internal revenue.[146] Blanche K. Bruce, chosen in 1874 as United States Senator, held three local offices simultaneously and served in a total of five offices during the early 1870's: tax assessor, superintendent of education, sheriff, alderman, and levee board member.[147]

Multiple service does not always raise separation of powers issues. The office of attorney general was created in the judiciary section of the 1869 constitution,[148] meaning that Joshua Morris may have been in the judicial branch whether he was acting as attorney general or as supreme court reporter. Service in the federal government and also a state office would not have violated separation of powers among the three branches of state government.[149] A different kind of separation of powers conflict during Reconstruction is described next.

Democratic senators in an October 1873 special session attempted to have three of their Republican colleagues expelled for holding other offices as well. The first senator whom Democrats challenged was their detested adversary Albert T. Morgan, a white carpetbagger from Wisconsin. It was said that

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[145] JAMES WILLFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 314 (Louisiana State Univ. Press ed., 1968) (1901).

[146] *Id.* at 314 n.2.

[147] Sadie Daniel St. Clair, The National Career of Blanche K. Bruce 54 (1947) (unpublished Ph.D. dissertation, New York University) (on file with author). Not noted was that in 1871, he was also commissioned a colonel in the militia. *Annual Report of the Adjutant General*, 1874 MISS. HOUSE J. APP. 677, 684.

[148] MISS. CONST. of 1869, art. VII, § 25. The supreme court much later held that the attorney general is in the executive branch, despite the creation of the office in a constitutional section on the judiciary. Dye v. State *ex rel.* Hale, 507 So. 2d 332, 346 n.20 (Miss. 1987). However, a court in the 1870's might have left the office where it was found.

[149] However, the separate provision barring service in a state office and also holding a position of "honor or profit" under the federal government is impacted. MISS. CONST. art. 14, § 266. The supreme court has held that the purpose of the provision is to "prohibit the holding of the two incompatible offices at once,—the exercising the functions and enjoying the rights of such two offices at the same time." State v. Kelly, 31 So. 901, 901 (Miss. 1902). That provision is not discussed here since this article focuses on separation of state governmental powers.

"none was more intense in his radicalism or more alienated from white society" than Morgan.[150] The reasons for seeking his removal from the senate were not just constitutional; they were visceral. Because he was ultimately the only senator to be removed, perhaps emotional reasons were more important than legal ones. Morgan "seemed to shun the society of the resident white citizens" and enraged many in 1870, by marrying Carrie Highgate, "a mulatto woman" from Jackson.[151] Earlier that year, Senator Morgan introduced legislation that removed the legal barrier to interracial marriage.[152] His legislative and personal actions flouted this "ultimate taboo" and left him an unredeemable pariah to many white Mississippians.[153] In 1875, a mob would evict Morgan, then serving as Yazoo County Sheriff, not only from his office but also from his county.[154]

In 1873, Morgan was in the fourth and last year of his term as a senator. In May, he had been elected Yazoo County Chancery Clerk and took office that same month.[155] Senator

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[150] WILLIAM HARRIS, DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 119 (1979).

[151] HARRIET DECELL & JOANNE PRICHARD, YAZOO: ITS LEGENDS AND LEGACIES 315, 319 (1976) (quoting Robert Bowman, "Reconstruction in Yazoo County," VII PUBLICATIONS OF THE MISSISSIPPI HIST. SOC. 115, 118 (1903)); ALBERT T. MORGAN, YAZOO, OR ON THE PICKET LINE OF FREEDOM IN THE SOUTH 342-54 (1884) (discussing reactions to marriage).

[152] *See* MORGAN, *supra* note 151, at 349; 1870 MISS. SEN. J. 297, 365, 383 (S.B. 194). The act repealed all statutes "which in any manner or in any degree, discriminate between citizens . . . founded on race, color" or former slavery. 1870 Miss. Laws 73, ch. 10. Senator Morgan likely was Highgate's sponsor when she was defeated in March 1870 in legislative balloting for state librarian and keeper of the capitol. 1870 MISS. SEN. J. 90-94, 100. Her candidacy was sufficiently newsworthy to be mentioned in the national press. *The Mississippi Legislature—Equal Rights—Opposition to Senator Elect Ames—A Colored Female State Librarian*, EVENING STAR (Washington, D.C.), Mar. 18, 1870, at 1. Perhaps this also still galled Morgan's Democratic foes in 1873.

[153] C. B. Waldrip, *Sex, Social Equality, and Yankee Values: White Men's Attitudes Toward Miscegenation During Mississippi's Reconstruction*, 64 J. MISS. HIST. 125, 142-45 (2002).

[154] BLANCHE AMES AMES, ADELBERT AMES: GENERAL, SENATOR, GOVERNOR, 1835-1933, 419-22, 438-39 (1964); *see also* Morgan, *supra* note 151, at 464-79 (depicting his version of events surrounding eviction). Morgan rejected Governor Ames' offer to send three militia companies to reinstate him as sheriff. AMES, *supra* at 438-39.

[155] In November of 1873, Morgan would be elected sheriff. Apparently, his

H.L. Duncan introduced a resolution to declare Morgan's seat vacant because of his service as clerk. No vote on the resolution was taken that day, but a motion to table was narrowly defeated.[156] A few days later, Senator R. H. Allen's motion was

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chancery clerk service was brief, arising from an election on May 10, 1873; he was commissioned on May 14. 1873 MISS. SEN. J. SPEC. SESS. 38. That election had been authorized by a special act adopted in March to fill the Yazoo vacancy. 1873 Miss. Laws Part II, ch. 31. The special election was because of "the failure of the people of said county to legally elect a person to fill said office at their last general election." *Id.*; *see also* Sublett v. Bedwell, 47 Miss. 266, 275-78 (1872) (nullifying the 1871 Yazoo chancery clerk election).

It would appear that maneuvers for the spoils of office included not only multiple office-holding but also legislative ordering of multiple elections and frequent private litigation. This was partly a result of the uncertainties next described. Congress did not restore the state to the Union until February 23, 1870, well after the state elections, held in November 1869, that anticipated readmission. State v. Williams, 49 Miss. 640, 662-63 (1873). The 1869 constitution provided that terms were to begin on the first Monday in January but did not state a year. *Williams*, 49 Miss. at 665. Litigation that was resolved in late 1873 held that the terms of elective offices began on the first Monday in January 1870, before the state was officially readmitted, and not on the first Monday in January 1871, which was after rejoinder of the Union. *Id.* at 661-69.

What may not have been based just on uncertainty was the legislature's attempt also in 1873 to order new elections for all chancery and circuit clerks and for district attorneys. It declared that the elections held in November of 1871 for those offices had been special elections; those chosen had not received full four-year terms but were to serve only until regular elections were ordered. 1873 Miss. Laws Part I, ch. 30. The supreme court voided this 1873 act finding that the 1871 election statute had clearly provided for election to four-year terms and "it will not be contended that such term can be interrupted by statutory enactment." Wolf v. Peyton, No. 1155 (Miss. 1874) (unreported; opinion in case file, Record Group 32, Series 6, Box 5893, Miss. Dept. of Arch. & Hist.); Brady v. West, 50 Miss. 68, 75 (1874) (applies *Wolf* ruling); Turnipseed v. Hudson, 50 Miss. 429, 435 (1874). The governor called the 1873 special session, at which Morgan was expelled, in order to bring order to the chaotic state of the election laws; he noted the confusion created by the act that would later be voided by *Wolf*. 1873 MISS. SEN. J. SPEC. SESS. 7-15 (governor's message). After the special session ended, one newspaper stated that the senate acted "shamefully" in failing to pass any election reform, a failure partly due to allowing those senators who held incompatible offices to vote. *The Duty Devolved Upon Gov. Powers by the Legislature*, WEEKLY CLARION (Jackson, Miss.), Nov. 6, 1873, at 2.

[156] *Legislative Proceedings, Senate, Fifth Day, Friday, Oct. 24, 1873*, WEEKLY CLARION (Jackson, Miss.), Oct. 30, 1873, at 1. Initially in this research, no bound journal of the 1873 special session was found. Fortunately, a Jackson newspaper provided details of each day's proceedings. Later, a journal was discovered. The newspaper citations have been retained and the journal citations added. The partisan bickering over dual office-holding appears in 1873 MISS. SEN. J. SPEC. SESS. 33-53.

adopted to add to the resolution the name of Senator William H. Gibbs, who was also serving as president of the Wilkinson County Board of Supervisors.[157] Gibbs was a "smiling, jovial carpetbagger from Illinois," one of the most "continuously influential" but "enigmatic" of the group, and who as state auditor when Democrats regained political control in 1876, survived the purges that ousted most other statewide Republican officials with actual or threatened impeachment.[158] The same motion added the name of Senator F. M. Abbott, who was serving as a Colfax (now Clay) County supervisor.[159] The resolution alleged that a county supervisor and a chancery clerk were judicial officers who could not also serve as legislators.[160]

Two days later, the senate's presiding officer, Republican Lieutenant Governor Ridgeley Powers, asserted that two additional members suffered from similar disqualifying dual service: Senator C. M. Bowles, appointed as commissioner for the sale of lands, forfeited for nonpayment of taxes, and Senator Marion Campbell was serving as DeSoto County Tax Collector.[161] Their names were not added to the resolution. Powers stated that he believed that the service by all five senators in other offices was incompatible with retention of their offices in the legislature:

> Since our adjournment yesterday, I have examined with more than ordinary care the judicial opinions bearing directly on

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[157] *"Legislative Proceedings, Seventh Day, Tuesday, Oct. 28, 1873*, WEEKLY CLARION (Jackson, Miss.), Oct. 30, 1873, at 3; 1873 MISS. SEN. J. SPEC. SESS. 35. Allen is the only senator at this 1873 special session to be a delegate to the 1890 constitutional convention. *Compare* 1873 MISS. SEN. J. SPEC. SESS. 35 (noting list of Senators), *with* MISS. CONST. of 1890, art. XV, § 285 (list of 1890 convention delegates). There is no evidence that Allen had a role in creating the 1890 separation of powers provision.

[158] HARRIS, *supra* note 150, at 118-19.

[159] *Legislative Proceedings, Seventh Day, Tuesday, Oct. 28, 1873,* WEEKLY CLARION (Jackson, Miss.), Oct. 30, 1873, at 3; 1873 MISS. SEN. J. SPEC. SESS. 35.

[160] *See Legislative Proceedings*, *supra* note 160.

[161] *Legislative Proceedings, Senate, Eighth Day, Wednesday, Oct. 29, 1873*, WEEKLY CLARION (Jackson, Miss.), Nov. 6, 1873, at 1; 1873 MISS. SEN. J. SPEC. SESS. 37-40. No mention was made of the fact that Campbell was also a colonel in the militia. *Annual Report of the Adjutant General*, 1874 MISS. HOUSE J. APP. 677, 685.

> the main question now before the Senate, and I am irresistibly forced to the conclusion that the several Justices have expounded the law correctly, that is, that one person cannot at the same time hold two offices that are incompatible with each other, and that the acceptance of the latter is a vacation of the former . . . .
>
> I apprehend that the question of one person holding two offices at the same time in Mississippi, divested of all political complications and individual interests, would be considered by all well-informed men as simply monstrous. Yet this is the question that you are called upon to determine . . . . I can reach no other conclusion than that Messrs. Morgan, Gibbs, Abbott, Campbell and Bowles are not members of this body, not are they entitled to vote on their own or each other's case. . . . [162]

Much parliamentary maneuvering followed. The senate voted to delete the names of county supervisors Abbott and Gibbs from the resolution. That left only Senator Morgan at risk. The resolution was adopted on a fifteen to eleven vote.[163] Then the issue was raised that since this was the equivalent of expelling a senator, that the resolution required a two-thirds majority.[164] The presiding officer rejected that argument, and the ruling was upheld.[165] The next day, Senator Abbott's vote on a bill was challenged for the same reasons as had formed the basis for the previous day's removal of Senator Morgan. Such partisan skirmishing continued, but no more removals resulted.[166]

Many other examples of dual office-holding likely could be discovered. This service was a significant irritant to those out-of-power during Reconstruction, in part perhaps, because it symbolized domination of public office by a small cadre of their

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[162] *Legislative Proceedings, Senate, Eighth Day, Wednesday, Oct. 29, 1873*, WEEKLY CLARION (Jackson, Miss.), Nov. 6, 1873, at 1; 1873 MISS. SEN. J. SPEC. SESS. 39.

[163] *See* 1873 MISS. SEN. J. SPEC. SESS. 39.

[164] *Id.*

[165] *Id.*

[166] *Legislative Proceedings, Senate, Ninth Day, Thursday, Oct. 30, 1873*, WEEKLY CLARION (Jackson, Miss.), Nov. 6, 1873, at 1; 1873 MISS. SEN. J. SPEC. SESS. 48.

political and cultural enemies.

That such affronts might recur seemed plausible in 1889. The Republican Party had won the presidency and a majority in both houses of Congress in the 1888 elections. This was the first time that the GOP would control the entire national government since January 1875.[167] The election in November 1875 overthrew the Republican government in Mississippi after forcible disfranchising of black voters.[168] Thus, the year of 1889 would be the first time that Republicans might be able to remedy what occurred in Mississippi and throughout the south in the mid-1870's.

"The immediate conviction developed that the Republicans would use the opportunity to extend Federal control of elections and to restore the Negro vote. . . . "[169] To Mississippi Democrats that conviction appeared ominously nearing validation when Massachusetts Representative Henry Cabot Lodge, Sr. introduced a bill in 1889 to place federal appointees on southern election boards.[170] These boards would have the authority to decide the qualifications of voters and verify returns.[171] This became known as the "Force Bill," which passed the House but was surprisingly blocked by a Democratic filibuster in the United States Senate in 1890.[172] While it was pending, the Force Bill helped spur reluctant Mississippi Democrats to call for a state constitutional convention. The Mississippi Democrats sought an alternative to the violence that had been used to impede voting which started in 1875.[173] Convention spon-

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[167] CONGRESSIONAL QUARTERLY, AMERICAN LEADERS 1789-1987: A BIOGRAPHICAL SUMMARY 432-35 (1987) (indicating party divisions for each Congress and presidency). For all but two years of this 1875-1889 period, Democrats controlled the House. When the GOP gained the House in 1881-1883, the Senate was tied. *Id.*

[168] For a discussion of the 1875 election campaign, see GARNER, *supra* note 145, at 372-75 (stating that the "election campaign of 1875 was the most exciting in the history of the state").

[169] VERNON LANE WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890, 208 (1947).

[170] KARL SCHRIFT GIESSER, THE GENTLEMAN FROM MASSACHUSETTS: HENRY CABOT LODGE 105, 105 n.1 (1944).

[171] *Id.* at 105 n.1.

[172] *Id.* at 106-07.

[173] *See* HARRIS, *supra* note 150, at 650-712 (describing violent tactics used to impede voting).

sors "argued the necessity of substituting legal for illegal tactics in disfranchising the Negro . . . before a federal 'Force Bill' should pass."[174]

The legislature authorized a constitutional convention to begin in August 1890. All of the 134 delegates elected were Democrats except for two Republicans and one Greenback Party member.[175] To replace intimidation, the delegates chose the poll tax and the requirement, when registering, that a voter "be able to read any section of the constitution of this state; or he shall be able to understand the same when read to him, or give a reasonable interpretation thereof."[176]

Though the franchise was the overeaching issue, addressing remembered political abuses from Reconstruction occurred as well. The 1869 constitution had been a weapon during that earlier time in disputes over the right to office. Those disputes had been frequent, bitter and varied. Raw politics was at least as important as constitutional principle in those battles to remove inconvenient officeholders. Perhaps the 1890 charter's effect on office-holding mischief was addressed because federal legislation could change the fortunes of Mississippi political parties.

It is improbable that the 1890 convention delegates believed that they were making utterly new law by declaring forfeiture of an office in one department when an office in another was acquired. During the battles over office during Reconstruction, the State's high court had noted "that a resignation by implication may take place by being appointed to and accepting a new office incompatible with the former one."[177] Removal from one office once an official accepts another one

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[174] ALBERT D. KIRWAN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS: 1876-1925, 59 (1951).

[175] STEPHEN CRESSWELL, MULTIPARTY POLITICS IN MISSISSIPPI, 1877-1902, 102-04 (1995).

[176] MISS. CONST. OF 1890, art. XII, §§ 243, 244.

[177] Turnipseed v. Hudson, 50 Miss. 429, 446-47 (1874). The incompatibility of offices is a concept that reaches beyond principles of separation of powers. Issues of whether two offices are incompatible because of inevitable conflicts of responsibilities or other factors will not be considered here. A review of such questions at a time not too distant from the 1890 constitutional convention appears in the appellee's brief in *Lindsey v. Attorney General*, 33 Miss. 508, 520-22 (1857).

may well have been seen as the natural effect of the official's actions. Thus this 1890 revision to the separation of powers provisions might have been considered a clarification, not an alteration.

What these amended 1890 provisions required was discussed in a significant case holding legislators could not constitutionally serve as members of the governing bodies for various boards and commissions that performed executive branch responsibilities. The opinion is instructive both for what it got right and for what a later precedent found that it had gotten wrong. In *Alexander v. State By and Through Allain*,[178] the court found a less than totally bright line of demarcation between the powers of the three separate departments of government:

> we need to examine the scope and depth of the legislative intrusions, if there be such. Indeed, if the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument of appellants that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities of the boards and commissions are ongoing and are in the upper echelons of governmental affairs, as are the boards and commissions under consideration, then the legislative trespass reaches constitutional proportions. At all times, we heed the vice intended to be prevented by the draftsmen by choice of words written into the constitution.[179]

As already discussed, the specific purpose of the language first proposed for Kentucky and later accepted in Mississippi was to make separation more absolute than in the federal constitution. The *Allain* court first quoted James Madison. Writing in the *Federalist Papers*, Madison argued "that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other

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[178] Alexander v. State By and Through Allain, 441 So. 2d 1329 (Miss. 1983), *modified* Dye v. State *ex rel.* Hale, 507 So. 2d 332 (Miss. 1987).

[179] *Alexander*, 441 So. 2d at 1336-37.

departments."[180] To be avoided was one branch's "overruling influence over the others in the administration of their respective powers."[181]

Then the court turned to the writings of Thomas Jefferson, focusing on Jefferson's statements that "the powers of government should be so divided and balanced among several bodies of magistry, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."[182] This is the same "Query XIII" from the *Notes on the State of Virginia*, in which Jefferson critiqued the 1776 Virginia Constitution.[183] That critique led to his drafting a proposed constitution from which the two Mississippi separation of powers provisions were taken.

The court reviewed the changes in the sections from 1817 through 1890.[184] It found significant that the "except as otherwise provided" language had been removed from the requirement that no powers be exercised by one branch that properly belonged to another.[185] That exception had appeared in all the first three constitutions, but not in the one for 1890.

> We must conclude the intention of the draftsmen was that there be no exceptions to the mandates that the powers of government be held and exercised in three separate and distinct departments and that no person holding office in any one department should have or exercise any power properly belonging to either of the others.[186]

This absolute statement was retracted five years later.

Despite such strong language, the provision was intended only to prevent "the powers properly belonging to one of the

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[180] *Id.* at 1336 (quoting THE FEDERALIST, NO. 48 (James Madison) (J. Cooke ed., 1961)).

[181] *Id.*

[182] *Id.* (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 1781-1785, ch. 13, *reprinted in* SAUL K. PADOVER, THE COMPLETE JEFFERSON, ch. 14, at 648-49).

[183] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, 1781-1785, ch. 14, *reprinted in* SAUL K. PADOVER, THE COMPLETE JEFFERSON, ch. 14, at 648-49.

[184] *Alexander*, 441 So. 2d at 1335.

[185] *Id.*

[186] *Id.*

departments [from being] directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers."[187] However, there will "inevitably" be, as government enlarges, "areas in which the functions of the separate bodies will clash with the idealistic concept of absolute separation of powers."[188] Before denouncing an encroachment, "we need to examine the scope and depth of the legislative intrusions, if there be such."[189]

> [When] the encroachment be occasional and thought necessary for efficiency in government, and if the transgression be into an administrative matter with no inherent danger of enlargement, then the argument of appellants that efficiency in government requires some overlapping has definite force. However, if the duties and responsibilities of the boards and commissions are ongoing and are in the upper echelons of governmental affairs, as are the boards and commissions under consideration, then the legislative trespass reaches constitutional proportions. At all times, we heed the vice intended to be prevented by the draftsmen by choice of words written into the constitution.[190]

The court found that legislators could not also serve on the executive branch agency boards. Yet despite the court's authority to order the removal of legislators for "constitutional trespass," the existence of that authority "hardly mandates its exercise."[191] The legislators were to be given "our respect commensurate with their standing and responsibilities," which in this case convinced the court to decline to order removal.[192] The defendants had until July 1, 1984, about seven months after its decision, to take the necessary corrective action.[193]

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[187] *Id.* at 1336 (quoting THE FEDERALIST, NO. 48 (James Madison) (J. Cooke ed., 1961)).

[188] *Id.*

[189] *Alexander*, 441 So. 2d at 1336-37.

[190] *Id.* at 1337.

[191] *Id.* at 1347.

[192] *Id.*

[193] *Id.*

Apparently, by then if the legislators had removed themselves from these boards, no removal from legislative office would be ordered.

In *Alexander*, the Mississippi Supreme Court soon backed away from its statement that there were no exceptions to the powers of one branch being exercised by those with an office in another. In *Dye*, a suit that challenged the lieutenant governor's exercise of legislative powers concerning the appointment of senate committees, the court overruled its statement and noted that the constitution explicitly recognizes and encourages intrusions as a part of checks and balances.[194] It is the nature and limit of those balances that constitute proper separation of powers analysis, not absolutism.[195]

Among the corrections made in *Dye* was to the *Alexander* statement that there was significance to the 1890 constitution's removing the specific language of exception in Section 2.[196] A review of the proceedings for the 1890 convention revealed that the convention had actually approved the provision with the language of exception.

> As approved on the convention floor, the prohibition in Section 2, like its 1869 predecessor, ended with an additional phrase "except in the instances in this Constitution expressly directed or permitted." *Journal of Proceedings* 442. Section 2 was sent to the Committee on Revision, which omitted this phrase in its final draft. *Journal of Proceedings* 581. The rules governing the Committee on Revision prohibited changes in the "intent or meaning of any matter." *Journal of Proceedings* 351-52. Logically, the revisors may have omitted this phrase because it is well understood that specific language, such as Section 129 [making the lieutenant governor the presiding officer of the Senate], controls over general language such as Section 2, and the phrase "properly belonging" sanctions exercises of power "otherwise directed or permitted" by the constitution.[197]

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[194] Dye v. State *ex rel.* Hale, 507 So. 2d 332, 343 (Miss. 1987)
[195] *Dye*, 507 So. 2d at 343.
[196] *Id.*
[197] *Id.* at 343 n.17.

There are many parts of the 1890 Mississippi Constitution that give other directions and permissions from strict separation of power principles. The lieutenant governor provision is simply one of the more unusual.[198] As the Anti-Federalist and Jeffersonian writings discuss, an executive veto power intrudes the executive into the legislative powers. Making the judiciary and executive dependent upon the legislature for its funding places that part of the necessary functioning of two branches within the control of a third branch. The 1890 constitution gave the governor the power to appoint and the legislature the option to confirm judges.[199] The *Dye* court was more clearly correct than it may have realized: the deletion of the language about exceptions did not indicate that purity in the application of separation of powers principles had arrived in the state constitution.

With this as the constitutional foundation for separate powers in Mississippi government, I turn to the recent episodes in which different branches clashed at the boundaries between them.

II. Shall We Waive the Flag? The Judiciary Preempts Legislative Resolution

The current Mississippi state flag, adopted in 1894, has in its upper left-hand section a St. Andrew's Cross with thirteen stars. That symbol is most recognized as being the cross used on the battle flag, Navy ensign and two of the national flags of the Confederate States of America. Those who argue that the flag is an emblem of slavery have had some success in recent years in making it contemptible to fly such a flag. The controversy did not succeed; however, it has caused the Mississippi Legislature to consider seriously any of the recurring bills that demanded the adoption of a new state flag. After the 2000 legislative session effectively ended on May 3, 2000, the Mississippi Supreme Court issued an opinion the next day about the

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[198] *Id.* at 342-43.

[199] Miss. Const. art. 6, § 153.

state's flag.[200] In brief, the flag was found to have been inadvertently decertified in 1906.[201]

After decades of controversy, protests, lawsuits, threatened legislative shutdowns by flag opponents, and suspected legislative retaliation by flag champions against city governments who removed the flag, the supreme court denied the existence of a state flag.[202] Editorials argued that the ruling "offers a new start."[203] Providing an opportunity for a fresh start regarding a flag was not the announced motivation of the decision. Taking the decision at face value, did it accurately determine the effect of events in 1906?

First, the background of the suit is examined, followed by an explanation of the court's reasoning. Finally, the relevant facts and law are explored.

A. The Suit

The plaintiffs, both the state NAACP and ultimately eighty-one individuals, sued the governor in 1993 for declaratory and injunctive relief.[204] A chapter of the Sons of Confederate Veterans was allowed to intervene.[205] The plaintiffs asserted that the state flag violated their constitutional rights because it incorporated a symbol associated with the Confederate States of America.[206] As such, it infringed on the plaintiffs' free speech, due process, and equal protection rights.[207] The trial court granted summary judgment to the defendants on November 15, 1993, reserving intervenor Sons of Confederate Veterans' motion for sanctions against the plaintiff.[208] An appeal was taken on December 13 by the plaintiffs.[209] On Sep-

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[200] Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000).

[201] *Confederate Veterans*, 94-CA-00615-SCT, ¶ 17, 774 So. 2d at 392.

[202] *Id.*

[203] Editorial, *State Flag*, CLARION-LEDGER (Jackson, Miss.), May 6, 2000, at 13A.

[204] *Confederate Veterans*, 94-CA-00615-SCT, at ¶ 1, 774 So. 2d at 388-89.

[205] *Id.* ¶ 2, 775 So. 2d at 389.

[206] *Id.* ¶ 9, 775 So. 2d at 390.

[207] *Id.*

[208] *Id.* ¶ 3, 774 So. 2d at 389.

[209] *Id.* ¶ 4, 775 So. 2d at 389.

tember 24, 1996, the chancellor denied the motion for sanctions finding due to the appeal and despite the reservation of the issue, he no longer had jurisdiction.[210] The intervenor appealed, and the plaintiffs filed a "cross-appeal."[211]

The Mississippi Supreme Court, in an order dated July 27, 1995, dismissed the plaintiffs' appeal from the judgment as being untimely.[212] The order was entered in response to the Sons of Confederate Veterans' motion to stay the rest of the suit and to remand its sanctions issue to the chancellor; in the brief order, no explanation was given explaining why the court found the 1993 appeal to be untimely.[213] In 1999, the court found that this order was erroneous.[214]

Still viable was the appeal by the Sons of Confederate Veterans from the denial of their motion for sanctions. On August 2, 1995, the supreme court remanded to the chancellor for reconsideration reasoning that the chancellor should not have dismissed for lack of jurisdiction.[215] In an order filed on September 24, 1996, the chancellor denied the request for sanctions on the merits.[216] The intervenors appealed. So did the plaintiffs, stating that they were appealing from the orders that had denied relief.[217] As already mentioned, the earlier appeal of the same orders had been dismissed in 1995 as untimely. The state moved to dismiss because the plaintiffs were seeking to "springboard that order denying attorneys fees into

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[210] Order filed Sept. 24, 1996, Confederate Veterans v. NAACP, No. 51,997 S/2.

[211] *Confederate Veterans*, 94-CA-00615-SCT, at ¶ 5, 774 So. 2d at 389.

[212] Order filed July 27, 1995, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 94-75-0099). Three appeals were consolidated by an order dated March 13, 1997, but an attempt is made in these notes to show the number of the precise appeals involved with each unpublished order.

[213] *Id.*

[214] *Confederate Veterans*, 94-CA-00615-SCT, ¶ 5, 774 So. 2d at 389.

[215] Order filed Aug. 2, 1995, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000), *after remand*, No. 96-CA-01667-SCT.

[216] Opinion and Order of the Hinds County Chancery Court filed Sept. 24, 1996, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000), *after remand*, No. 96-CA-01667-SCT.

[217] Mississippi State Conference of NAACP's Notice of Appeal dated Oct. 21, 1996, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 96-CA-01667-SCT).

another attempt to appeal" the 1993 orders.[218] On July 17, 1997, the supreme court in a three-judge order again dismissed because the plaintiffs' appeal was untimely; the court also reaffirmed its 1995 order dismissing the plaintiffs' first appeal which left the intervenors' appeal for briefing and decision.[219]

The larger issue would not die. The plaintiffs filed what they called "A Combined Brief for Appellee/Cross-Appellant" and filed it in the sanctions case still pending on appeal.[220] However, in the first nine pages of the brief, the challenge to the merits of the 1993 orders was renewed.[221] The other parties moved to strike arguing that the brief was an improper attempt to continue the plaintiff's already dismissed appeal. On January 26, 1998, the court agreed with the state and struck the offending portions of the brief.[222] Still, the matter continued. On February 18, 1998, the plaintiffs filed a motion for rehearing, en banc, of the order. By appellate rule, motions for dismissal of an appeal may not be ruled upon by a single justice, but the court could, usually does, and in this case did consider that motion by a three-judge panel.[223] Any party aggrieved may seek reconsideration.[224] Thus en banc consideration of the three-judge dismissal was appropriate under the rules.

On May 24, 1999, the supreme court granted rehearing en banc. The court ruled that no proper appeal had been taken from any part of the case until the chancellor denied sanctions on the merits in 1996. The earlier appeal had been premature.[225] The briefing schedule was revived and updated, and

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[218] State's Motion to Dismiss on Record of Hearing.

[219] State's Brief filed Apr. 16, 1997, Court's Order of July 17, 1997, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 96-CA-01167-SCT).

[220] *Id.*

[221] Mississippi State Conference of NAACP's Brief filed Dec. 18, 1997, Confederate Veterans v. NAACP, 96-SCT-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 96-CA-01167-SCT).

[222] Order of Jan. 26, 1998, Confederate Veterans v. NAACP, 774 So. 2d 388 (Miss. 2000).

[223] MISS. R. APP. P. 27(c), 24 (a).

[224] MISS. R. APP. P. 27(b).

[225] Order of May 24, 1999, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000).

the case reinstated on the docket. All issues resolved in the trial court were still reviewable. The result was the May 2000 decision.

B. Supreme Court's Analysis

First, the court quickly disposed of the sanctions issue: "Because this Court deems the issue to have arguable merit, sanctions against the NAACP are inappropriate."[226]

Next, and also relatively summarily, the court found that the state flag did not violate the plaintiffs' rights. It held that the constitutionality of flying a confederate flag was resolved in federal suits whose reasoning the court implicitly adopted.[227] Then the court cited one of its own precedents for the proposition that whether to fly this flag was a decision solely for the political branches.[228] The court closed this section of the opinion by finding that "the NAACP failed . . . to offer any proof that the flying of the State Flag deprives any citizen of a constitutionally protected right."[229]

Having decided that there was no violation of the plaintiffs' rights, but that sanctions for a frivolous suit also were inappropriate, the court went on to determine whether a state flag even existed. Perhaps this was viewed as an alternative basis for the decision that had already been reached. What had earlier occurred in the suit as to that question will be noted next.

The issue had been alleged in Count II of the complaint this way: "the act adopting the flag was repealed by Miss. Code Ann. § 1-1-19. Therefore, there is no official state flag."[230] That statute concerns repeals of uncodified statutes. The state's motion to dismiss at the trial court addressed the argu-

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[226] *Confederate Veterans*, 94-CA-00615-SCT, ¶ 6, 774 So. 2d at 389.

[227] *Id.* ¶ 7, 774 So. 2d at 389 (citing Coleman v. Miller, 912 F. Supp. 522, 531 (N.D. Ga. 1996,), *aff'd*, 117 F.3d 527 (11th Cir. 1997); NAACP v. Hunt, 891 F.2d 1555 (11th Cir. 1990).

[228] *Id.* ¶ 8, 774 So. 2d at 389-90 (citing Daniels v. Harrison County Bd. of Supervisors, 96-CA-01129-SCT, 722 So. 2d 136 (Miss. 1998)).

[229] *Id.* ¶ 10, 774 So. 2d at 389.

[230] Mississippi State Conference of NAACP's First Amended Complaint filed July 9, 1993, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000).

ment.[231] The NAACP responded with affidavits discussing the harm caused by the flag, but there was nothing in the record filed by the NAACP that addressed repeal. In the ruling, the chancellor did not discuss the point.[232] On appeal, the NAACP reargued the federal constitutional issues and also addressed the point rejected by the chancellor that the language of the Flag Act was impermissibly vague. Nothing was said about the possible repeal.[233] Consequently, the possibility of repeal was raised on appeal only by the court itself.

Thus having noted the issue sua sponte, the court discussed that the flag was part of an 1894 enactment that also adopted a coat-of-arms for the state.[234] In order to present the issue for consideration at a special legislative session in 1894, the governor delivered this message:

> Gentlemen—I respectfully submit for your consideration a question often asked of Mississippians, the inability of which to answer sometimes confuses their sense of patriotic ardor and puts their State pride before a point of interrogation. That question is "What is the Coat-of-Arms of Mississippi; what is your State Flag?"
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> The humiliating answer is, "We have no Coat-of-Arms; we have no State Flag!"
>
> Prior to the year 1861 there seems to have been no action [taken] on these subjects. In that year a convention of the people of Mississippi did adopt a Coat-of-Arms and Flag for the State. But in August 1865, another convention was in session, and on the 23d of that month the Ordinance of 1861, creating a Coat-of-Arms and State Flag, was abrogated, the Coat-of-Arms and State Flag abolished, and since that time the State has had neither.[235]

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[231] Mississippi State Conference of NAACP's First Amended Complaint filed July 9, 1993; State Defendants' Memo of Law in Support of Motion to Dismiss, filed Sept. 16, 1993, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 94-CA-00099).

[232] Opinion of Court filed Oct. 1, 1993, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 94-CA-00099).

[233] Appellant's Brief filed July 5, 1995, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000) (No. 94-CA-00099).

[234] *Confederate Veterans*, 94-CA-00615-SCT, ¶ 13, 774 So. 2d at 391; 1894 Miss. Laws, ch. 37.

[235] 1894 Miss. Laws, Special Messages 149-50 (quoted in *Confederate Veterans*,

The first codifications of the laws after that date was in 1906. The court quoted a provision of the 1906 Act that adopted the code, "on and after the first day of October, 1906, all laws of a general character not brought forward and embodied in the Mississippi Code of 1906 shall be thereafter repealed . . . ."[236]

The reasoning employed by the Supreme Court is summarized in this one sentence:

> Chapter 37, Laws of 1894, which adopted the State Flag and State Coat-of-Arms is a general law which was not brought forward in the Code of 1906; and therefore, it was repealed by legislative prerogative in accordance with Section 13 of the Act of Adoption of the Mississippi Code of 1906.[237]

The court concluded that as a result of this oversight, the 1906 legislature repealed the act. Since October 1906, though unknown until May 2000, Mississippi has had no state flag. Its status is unofficial and arises from "custom and usage."[238]

It is this analysis that is now reviewed.

C. Relevant Statutes

The language of several statutes is initially useful.

1. The Flag and Coat-of-Arms Act

This act adopted the report of a special committee that designed both a flag and a coat-of-arms.[239] This act has never been codified. The statute establishing the only previous state flag, the 1861 Magnolia Flag, was also never codified. In fact, the 1861 Magnolia Flag Act was repealed in 1865 along with other secession-driven enactments.[240] No code was adopted

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94-CA-00615-SCT, ¶ 11, 774 So. 2d at 390).

[236] 1906 Miss. Laws, ch. 101, § 13 (quoted in *Confederate Veterans*, 94-CA-00615-SCT, ¶ 16, 774 So. 2d at 391).

[237] *Id.* ¶ 17, 774 So. 2d at 391-92.

[238] *Id.*

[239] 1894 Miss. Laws 33, ch. 37 (committee's report verbalizing the design is at page 154).

[240] Ordinance No. 1, J. MISS. CONST. CONV. 34-36 (1865) (declaring void or-

during that four-year period because a new codification of statutes was not a primary concern between 1861 and 1865. Thus, the 1906 Code was the one first adopted when there was a flag design statute in effect.

2. Acts Authorizing and Adopting 1906 Code

a) A new code was authorized in 1904.[241] Commissioners were to "revise, arrange and classify all the statute laws of this state of a general nature into one code . . . ."[242]

b) The code was adopted in 1906.[243] Section 1 of the act of Adoption refers to "an enrolled draft" of the code that was thereby adopted.[244] This suggests that the code, in its final form, existed on April 21, 1906, the date that the act was signed by the governor. However, the matter of a new code was being rushed near the end of the legislative session. An advisory opinion was requested from the supreme court on April 19. The opinion concluded that the act adopting the code could be passed before the legislative revision committee had completed all of its work.[245] Whatever was still unsettled, though, the sections that concern us had already been finalized.

c) The following repealer in the Act of Adoption is what the supreme court relied upon:

> On and after the first day of October, 1906, all laws of a general character not brought forward and embodied in the Mississippi Code of 1906 shall be thereafter repealed; but this Act shall not apply to any Act of the Legislature adopted at the present session thereof.[246]

d) The code became effective on October 1, 1906. It had a different repeal section:

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dinance of secession and other matters, including ordinance of March 30, 1861, providing for coat-of-arms and flag); 1894 Miss. Laws, Special Messages, 149-50.

[241] 1904 Miss. Laws, ch. 100.

[242] *Id.* § 1.

[243] 1906 Miss. Laws, ch. 101 (approved April 21, 1906; effective "from and after its passage").

[244] MISS. CODE, Act of Adoption (1906).

[245] 1906 MISS. SEN. J. 1087.

[246] 1906 Miss. Laws, ch. 101, § 13 (effective April 21, 1906).

> [A]ll acts and parts of acts, the subjects whereof are revised, consolidated, and re-enacted in this code, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed, subject, however, to any express regulations relating thereto which may be contained in this code.[247]

This latter provision did not refer to Section 13 of the Act of Adoption, nor did Section 13 refer to it. No subject in the code included the flag or coat-of-arms, nor was any part of the 1894 Act revised, consolidated, or re-enacted in the code.

D. The Issues

Three necessary issues comprise the analysis of the possible repeal of this statute: 1) whether the Flag and Coat-of-Arms Act is a law "of a general character;" 2) whether section 3 of the 1906 Code controls over chapter 101, section 13 of the 1906 Miss. Laws; 3) whether any statute passed since 1906 would have revived a repealed Flag and Coat-of-Arms Act. These issues will be discussed in order.

1. Definition of a General Law

The first preliminary question is whether the reference in the 1906 Act of adoption to laws of "a general character" is the same thing as "general laws"? The former could be seen as an ad hoc legislative description of the task for the codifiers, while the latter is a statutory term of art. In an early case, the supreme court assumed without discussion that "general character" in the section 13 repealer meant the same thing as "general laws."[248] Something of a distinction is made in a more recent case that will be discussed later.[249]

The second initial matter is that in 1900 when a supplement to the 1892 Code was prepared, the 1894 Flag and Coat-of-Arms Act was not considered to be a general law.[250] This

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[247] MISS. CODE § 3 (1906).

[248] Postal Tel. Co. v. Shannon, 44 So. 809, 809 (Miss. 1907) (holding law that prohibited unreasonable delay in delivery of a telegraph dispatch was a general law repealed by section 13 of the Act of Adoption).

[249] *See infra* note 313 and accompanying text.

[250] J.A.P. CAMPBELL, JR., A SUPPLEMENT TO THE CODE OF 1892 (1900).

volume divided the acts passed since 1892 into three sections: 1) "General Laws Passed Since Adoption of Code;"[251] 2) Laws adopted at the 1900 legislative session;[252] and 3) amendments to specific sections of the 1892 Code.[253] The Flag and Coat-of-Arms Act does not appear in the general laws section, nor is it shown as an amendment to any section of the 1892 Code. The compiler listed many 1894 acts as amendments to code sections; a few were shown as "general laws." For example, chapter 41 is included as a general law, but chapter 37, the Flag and Coat-of-Arms Act, is not.[254]

Of course, the 1900 compiler could have been incorrect in his understanding of the concept of "general laws." I turn now to the core question: what is a general law? There are several references in the constitution to general laws on the one hand, and special, local and private laws on the other.[255] None of those provisions shed meaningful light on the issue here.

The two broadest divisions for statutes are: 1) public laws concerning the public at large, which may be general, local or special; and 2) private laws relating only to particular persons and private concerns.[256] All statutes may be classified as public or private, then further into general, special or local. "Public" includes everything that is not a private bill, the latter being of such limited effect that a court cannot take judicial notice of it.[257] A "local" act is one whose operation is confined to a part of the state, while a "special" act is one that "relates to particular persons or things of a class."[258] General laws ap-

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Campbell was the son of former Chief Justice J.A.P. Campbell, but there is no evidence that the father had any role in the preparation of the supplement.

[251] *Id.* at 20.

[252] *Id.* at 63.

[253] *Id.* at 103.

[254] *Id.* at 23.

[255] *See* MISS. CONST. art. IV, § 75 (laws of a general nature cannot go into effect for sixty days); *id.* § 87 (no special or local in some circumstances); *id.* § 88 (content of general laws); *id.* § 89 (standing committee for local laws); *id.* § 90 (matters subject to general laws only); *id.* § 278 (commissioners promptly to codify general laws after constitution adopted).

[256] Haas v. Hancock County, 184 So. 812 (Miss. 1938). The word "private" has sometimes been used as a synonym for "special." *Haas*, 184 So. at 812.

[257] EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 69 (1940).

[258] *Id.* § 70.

ply to and affect all the people.[259] These principal categories are explained in the court's quote from an old legal encyclopedia:

> Test as to Character of Law.—In determining whether a law is public, general, special, or local, the courts will look to its substance and practical operation rather than to its title, form, and phraseology, because otherwise prohibitions of the fundamental law against special legislation would be nugatory . . . . It is well settled that . . . a law is general in the constitutional sense, which applies to and operates uniformly on all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law. Laws are general and uniform not because they operate on every person in the state, for they do not, but because they operate on every person who is brought within the relations and circumstances provided for.[260]

In the same encyclopedia immediately before this section appears other guidance:

> A *special or private act* is one relating to particular persons or things of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to the law might, but for such limitations, be applicable . . . . The phrase *"local law"* means, primarily at least, a law that in fact, if not in form, is directed only to a specific spot . . . . The commonly accepted definition of a *general law*, as distinguished from a special or local law, is that it is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such a class. According to the definition incorporated in the constitution of some states a general law is law which applies to the whole state, a local law is a law which applies to any political subdivision or subdivisions of the state less than the whole, and a special or private law is one which applies to an

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[259] 2 NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 40.02, at 190 (5th ed. 1993); *see also* City of Vicksburg v. Sun Mutual Ins. Co., 16 So. 257, 258 (Miss. 1894) (stating that a "law is general if it acts alike upon all the inhabitants").

[260] Toombs v. Sharkey, 106 So. 273, 275 (Miss. 1925) (quoting 25 R.C.L. *Statutes* § 66, at 815-18 (1929)).

individual, association, or corporation.[261]

An example of a private act is one that grants a charter to one corporation.[262] One local act ratified a specific county's prior payment of funds for unauthorized purposes.[263] Case law regarding "special acts" often concerns whether certain classifications are reasonable or improperly benefit individuals. The supreme court upheld the statute of repose that blocked litigation against architects and builders for improvements to real property ten years after completion of the improvements.[264] One challenge to this legislation was that this was unconstitutional special legislation for the classes of builders and architects.[265]

The Mississippi Constitution prohibits local or special laws on a variety of subjects.[266] It also prohibits special or local laws when "a general law can be made applicable, and would be advantageous."[267] Much of the case law applying this prohibition deals with classifications of persons and objects of legislation. For example, a 1975 case examined whether a county can be classified based on the fact that two designated highways intersect in that county.[268] Similarly, a 1978 case caused the court to decide whether a statute classifying counties based on population was constitutional.[269] Those issues do not concern us here.

The operation of the act *upon* something appears to be the

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[261] 25 R.C.L. *Statutes* § 65, at 813-14 (emphasis added).

[262] CRAWFORD, *supra* note 257, § 80.

[263] Miller v. Tucker, 105 So. 774, 784 (Miss. 1925).

[264] Anderson v. Fred Wagner & Roy Anderson, Jr., Inc., 402 So. 2d 320, 324 (Miss. 1981).

[265] *Id.* at 322, 324.

[266] MISS. CONST. art. IV, § 90.

[267] MISS. CONST. art. IV, § 87.

[268] Smith v. Transcon. Gas Pipeline Co., 310 So. 2d 281, 284-85 (Miss. 1975) (holding that a law "purporting to exclude Jones County from the general Act, unconstitutional and void" under the Fourteenth Amendment of the United States Constitution as well as sections 87 and 90 of the Mississippi Constitution of 1890).

[269] Jackson Redevelopment Auth. v. King, Inc., 364 So. 2d 1104, 1107 (Miss. 1978) (holding that a local, private and special law granting the right of eminent domain to a municipality was unconstitutional under section 90(4) of the Mississippi Constitution of 1890).

starting point for whether it is a general law. For example, the declaration of a certain calendar week as "State Friendship Week" is not a general law unless obligations attendant to the week are also adopted. Similarly, the flag design act itself had no effect on the obligations or rights of people. It was separate statutes that later dealt, for example, with criminalizing the desecration of the flag that had such an effect.[270]

There are ambiguities created by trying to fit the Flag and Coat-of-Arms Act within any of the categories. It is probably not a general law, since it has no *application* on citizens—it does not create duties, grant rights, or otherwise "embrace a class of subjects." It is not a local act, since it does not apply to a specific geographic area. Instead, it is a public act as compared to a private act. This statute most comfortably fits in the category of a "special act." It "relates to particular persons or things of a class."[271] It designates a single design as the one that will be the state flag. Other enactments have made specific symbolic designations, such as for a state bird,[272] flower,[273] beverage,[274] and most recently, state toy.[275] Those designations were codified.[276] Not codified was the selection of an official state song, state dance, or a state grand opera house.[277]

In each of these designations of state symbols, it could be argued that the class is the entire category in question, such as all birds, all songs, and even all proposed flag or coat-of-arms designs, but since the legislature declares one as the official state version of the category, this is special legislation. Under the state constitution, many categories of special or private legislation are specifically prohibited.[278] No such constitution-

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[270] 1916 Miss. Laws 175, ch. 118, § 1.

[271] CRAWFORD, *supra* note 257, § 70.

[272] 1944 Miss. Laws 548, ch. 326, § 1 (the Mockingbird).

[273] 1952 Miss. Laws 465, ch. 340, § 1 (the Magnolia blossom).

[274] 1984 Miss. Laws 148, ch. 394, § 1 (milk).

[275] 2002 Miss. Laws 385, ch. 466, § 1 (the teddy bear).

[276] MISS. CODE ANN. §§ 3-3-9 (state bird, 3-3-11 (state flower), 3-3-29 (Rev. 1991) (state beverage), § 3-3-43 (state toy).

[277] 1962 Miss. Laws 1153, ch. 654 ("Go, Mississippi"); 1995 Miss. Laws 11, ch. 303 (the square dance); 1993 Miss. Laws 65, ch. 313 (the opera house in Meridian).

[278] *See, e.g.*, MISS. CONST. art. 4, § 90 (f) (disability of minority removed only

al prohibition exists for designating state symbols. However, any legislation creating responsibilities regarding these symbols would be general legislation. For example, if all citizens were made to salute or not desecrate the state flag, or children were to be offered the state beverage or sing the state song at school once a day, whether enforceable or not, that would be general legislation.

The 1906 Code's treatment of similar laws may be revealing. It appears, though, that a flag and a coat-of-arms were the only state symbols yet adopted by the legislature in 1906. The bloom of the magnolia tree was already referred to as the state flower, since the designation was based on a statewide vote of school children that occurred in 1900.[279] The legislature indicated its agreement a half century later.[280] No other enactment regarding symbols existed in 1906. However, the state argued in *Confederate Veterans v. NAACP* that a then-recent 1900 statute designating the old state penitentiary grounds as the site for a new capitol was not codified either.[281] Instead, there were statutes creating obligations for the secretary of state regarding the use of the "New Capitol," but nothing was codified that designated its location.[282] Surely that building, completed in 1903, remained the capitol after the 1906 Code was adopted.

The earliest legislative adoption of any other symbol was for a state tree, also the magnolia.[283] The 1938 state tree designation was included in the 1942 Code.[284] The code was prepared with the active guidance of former Mississippi Supreme

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by general laws); *see also id.* § 90 (a) (divorces).

[279] DUNBAR ROWLAND, HISTORY OF MISSISSIPPI, THE HEART OF THE SOUTH 293-94 (1925).

[280] Act of Feb. 28, 1952, ch. 340, § 1, 1952 Miss. Laws 465, 465 (current version at MISS. CODE ANN. § 3-3-13 (1972)) (preamble refers to the 1900 student vote).

[281] State Defendants' Memorandum of Law in Support of Motion to Dismiss, Confederate Veterans v. NAACP, 94-CA-00615-SCT, 774 So. 2d 388 (Miss. 2000); *see* 1900 Miss. Laws chs. 6, 51, & 55.

[282] MISS. CODE ANN. §§ 4653-59 (1906).

[283] Act of Feb. 8, 1938, ch. 366, § 1, 1938 Miss. Laws 749, 749 (current version at MISS. CODE ANN. § 3-3-9 (2002)).

[284] MISS. CODE ANN. § 6192 (1942).

Court Justice George H. Ethridge, who after his 1940 defeat became the Assistant Attorney General.[285] The Attorney General was to supervise the compilation of all "general statutes . . . of a permanent nature."[286] It is unknown whether the state tree statute was considered a general law or just a permanent matter that Ethridge found should be in the code. To "over-codify" has different ramifications than a failure to codify in the face of a repeal provision. It is also of interest that the magnolia tree statute was codified but not the flag and coat-of-arms statute. There is no hint that the legislature believed the flag statute had lapsed, as a state flag continued to be referenced in other statutes in the 1942 Code.[287]

A final and directly applicable definition of a special law is this:

> a law is a general one when it applies equally to all persons embraced in a class founded upon some natural, intrinsic, or constitutional distinction; on the other [hand], it is special legislation if it confers particular privileges, or imposes peculiar disabilities or burdensome conditions, in the exercise of a common right, upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law.[288]

A special law concentrates on something "arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law."[289] Selecting a "winner" among choices in a contest "confers particular privileges."[290]

If the Flag and Coat-of-Arms Act was a special law, then section 13 of the act of adoption did not repeal it. The only potentially relevant provision would be section 8 of the 1906

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[285] MISS. CODE ANN. Vol. I, p. vii (1942).

[286] 1942 Miss. Laws 418, ch. 318, § 1.

[287] *See, e.g.*, Act of April 8, 1916, ch. 118, § 1, 1916 MISS. LAWS 175, 175-76 (current version at MISS. CODE ANN. § 97-7-39 (2002)).

[288] People v. Western Fruit Growers, 140 P.2d 13, 19-20 (Cal. 1943).

[289] *Western Fruit Growers*, 140 P.2d at 19-20.

[290] *See* Quantrill v. Warren, 998 P.2d 644, 646 (Okla. Civ. App. 1999) (stating that statute requiring fourteen flags to fly at Oklahoma capitol *may* be special legislation).

Code. It states that all "[p]rivate and local laws not revised and brought into this code are not affected by its adoption."[291] However, section 8 does not apply if the Flag and Coat-of-Arms Act is a special law rather than a private or local law. Regardless, section 8 preserves acts and does not repeal them. Under this reasoning, nothing in the Act of Adoption nor the code itself causes the repeal of this act. The applicable rule then is that repeals by implication are disfavored.[292]

In the inherently difficult area of categorizing this unusual act, another basis for a narrow definition of "general laws" repealed by the 1906 Code is the fact that legislators did not believe that the Flag and Coat-of-Arms Act had been deleted. Laws premised on the existence of a state flag were passed as early as 1916.[293] Even if this act is not beyond question a special law, there is doubt that it is a law of a general character. It is with that foundation that the next issue is examined.

2. The Dueling Repeal Provisions

A conflict resulted because a statute that became effective on April 21, 1906, defined the category of laws that would be repealed on October 1, 1906, in a manner that might include the flag statute, while a section of the code that became effective on that same October day definitely does not.

The April 21, 1906, language from the Act of Adoption states that the cancellation occurs only "on and after October 1, 1906,"[294] so nothing could have been repealed until October 1. Section 3 of the code became effective on October 1, 1906.[295] Thus on the very date that certain statutes were to be repealed, another statute became effective. Did the repeal under

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[291] MISS. CODE § 8 (1906); Madison County v. Stewart, 20 So. 857 (Miss. 1896) (holding that a particular statute would not be repealed by a general statute unless the repugnancy is so great as to show a clear legislative purpose to that effect).

[292] Panola County v. Town of Sardis, 157 So. 579, 583 (Miss. 1934) (holding that a board of supervisors' power under statute to levy bridge tax would not be affected by statute dealing with the general working of roads).

[293] 1916 Miss. Laws 175, ch. 118, § 1 (penalty for desecrating the flag).

[294] 1906 Miss. Laws 83, ch. 101, § 13.

[295] MISS. CODE ANN. § 2 (1906).

the earlier act occur an instant past midnight September 30, thereby canceling sections before the code itself came into effect? There is no basis to make that argument. The earlier act made repeals "on and after" October 1, while the Code became effective "on" October 1.

Two parts of the same enactment are in potential conflict—section 13 appears in the act that adopted an entire code, and the code included a differently phrased section 3 on repeal. The guiding principle is to construe different statutes as being consistent, unless to do so does violence to the actual language.[296] "In the absence of an irreconcilable conflict between two acts of the same session, each will be construed to operate within the limits of its own terms in a manner not to conflict with the other."[297]

Is the finding of an inconsistency avoidable? Section 13 of the Act of Adoption states that "on and after the first day of October, 1906, all laws of a general character not brought forward and embodied in the Mississippi Code of 1906 shall be thereafter repealed."[298] Section 3 of the Code of 1906 states that "all acts and parts of acts, the subjects whereof are revised, consolidated, and re-enacted in this code, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed."[299] An effort to find a consistent meaning would examine the fact that the 1906 Act of Adoption was created after section 3 of the Code had already been prepared. The 1906 Code was drafted during 1904 and 1905 by three commissioners and submitted in late 1905. The language that became section 3 was in the identical form as the original proposal.[300] Thus as adoption language was prepared in the legislature, the slightly different language in the code itself was never altered.

Section 3 easily could be seen as the legislatively-accepted interpretation of laws of a general character. Section 3 is pre-

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[296] Yarbrough v. Camphor, 645 So. 2d 867, 871 (Miss.1994).
[297] SINGER, *supra* note 259, at 386.
[298] 1906 Miss. Laws 83, ch. 101, § 13.
[299] MISS. CODE ANN. § 3 (1906).
[300] A.H. WHITFIELD, ET AL., (PROPOSED) MISSISSIPPI CODE OF 1906 § 3 (1905).

cise—only if the subject matter of an uncodified statute has been brought forward into the code, or is repugnant to it, is that uncodified act repealed. Section 13 is more ambiguous. The statutory construction canons require that the precise language control, thus becoming the definition for the ambiguous language adopted at the same time.

The chairman of the governor-appointed commission to arrange and classify the Missisippi statutes into one code described the preparation of the draft code. Each commissioner took a third of the chapters of the Code of 1892, "and brought forward all the acts amendatory of the chapters to be revised by him."[301] There was no section in the 1892 Code dealing with state symbols, much less flags specifically. Though the number of subject headings grew from 145 in the 1892 Code to 151 in the 1906 Code, the new ones were for three new governmental departments and four other subjects enacted since 1892.[302] Of course, a flag and coat-of-arms section could have also been added, but it was not. The only 1892 section to be omitted had provided for a state census, which was no longer required because of an amendment to the 1890 constitution.[303]

Understanding the approach of the three codifiers, the reason is clear for selecting repeal language that refers to "acts, the subjects whereof are revised, consolidated, and re-enacted in this code."[304] Looking at the 151 subjects into which all codified statutes were placed in 1906, arranged alphabetically from "actionable words" to "wills and testaments," no subject relevant to the flag or coat-of-arms appears.[305]

However, if the two repeal provisions are seen as irreconcilable, then other rules come into play. Both the enabling legislation and the code itself were passed at the same time in

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[301] Chief Justice A.H. Whitfield, *To The Legislature, the Bar, and the Press*, DAILY CLARION-LEDGER (Jackson, Miss.), November 5, 1905, at 16 (this explanation is referenced but not reproduced in 1906 MISS. HOUSE J. at 71).

[302] *Compare* MISS. CODE ANN. (1892) at 117-19 *with* MISS. CODE ANN. (1906) at 139-41.

[303] MISS. CONST. art. 4, § 105 (editor's note).

[304] MISS. CODE ANN. § 3 (1906).

[305] *See generally* MISS. CODE ANN. (1906).

April 1906. However, the code provision became *effective* later. In a case dealing with the adoption of the Code of 1930, the supreme court stated that when two acts are adopted on the same day, "the one taking effect last will become the law from that day, where they are in necessary conflict."[306] In *Rackley,* one act became effective immediately. It stated that a circuit judge could dispose of a county court appeal in vacation. That act ignored a supreme court case that had invalidated an earlier statutory version to that same effect. The 1930 codifiers left the provision out of the code. The *Rackley* court said even though the act readopting the county court appeal language and the adoption of the code both came into being on May 19, 1930, the code controlled because the code became effective on November 1, 1930.[307] As of that date, it canceled the re-adoption that had been made effective immediately on May 19. A case relied upon in *Rackley* stated that if conflicts between statutes signed by the governor on the same day cannot be reconciled, then the one with the later effective date "of course . . . prevails from that date."[308]

There is now a statute in Mississippi dealing with inconsistent bills passed in one legislative session. It addresses conflicting amendments to the same section of law, which is not quite our issue.[309] Even though it was adopted in 1993, it might be usable guidance for statutes passed before 1993. Regardless, there was case law such as *Rackley* that could give guidance even in the absence of the statute. The act that becomes effective first continues until canceled on the effective date of the conflicting statute.[310] Since these problems recur, there is a body of law created specifically for codifications. Generally a codification repeals inconsistent statutes and has no effect on consistent ones.[311] Therefore, unless the language of the 1906 Act that adopted the code canceled the Flag and Coat-of-Arms

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[306] Rackley v. State, 146 So. 459, 460 (Miss. 1933).

[307] *Rackley*, 146 So. at 460.

[308] Swift & Co. v. Sones, 107 So. 881, 884-85 (Miss. 1926); *see also* Sartin v. Prentiss County, 125 So. 563, 565 (Miss. 1930).

[309] MISS. CODE ANN. § 1-3-79 (Miss. 1948).

[310] SINGER, *supra* note 259, § 23.17 at 387.

[311] SINGER, *supra* note 259, § 23.14 at 371.

Act, it remained in effect.

There is even case law holding that if an act is omitted by oversight, it may continue in effect despite general repeal language.[312] That law is unconvincing. Nonetheless, the supreme court with different words has followed that approach for a law that was arguably deleted by the 1906 Code. The appeal required the court to construe the 1906 Act of Adoption's reference to "laws of a general character."[313] The court did not hold that an 1858 Act that divided Hinds County into two separate judicial districts was a "special law," but it did state that the 1858 Act was "not of such a 'general character' as to be repealed by the [Act adopting the] Mississippi Code of 1906" when the codifiers failed to include it.[314] In fact, there was then-recent case law that creating two judicial districts in another county was not a special act.[315] Two 1906 Code sections that established dates for court terms in each county referred to two districts in Hinds County.[316] After the 1906 Code, many other statutes had been enacted that "recognized the existence of two judicial districts in Hinds County."[317]

The *Baker* court's failure to mention code section 3 might mean that it did not examine the then-seventy-year-old code beyond the first relevant pages in the published volume where the Act of Adoption can be found.[318] The court found that the 1858 Act creating two judicial districts in Hinds County was not repealed by the failure of either the 1906 or the 1930 Code to codify it. In order to uphold the intent of the legislature and also in order not to "impute an unjust or unwise purpose," the court would adopt "any other reasonable construction [that

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[312] SINGER, *supra* note 259, § 28.08 at 485.

[313] Baker v. State, 327 So. 2d 288 (Miss. 1976).

[314] *Baker*, 327 So. 2d at 291.

[315] Carter v. Harrison County Election Comm'n, 183 So. 2d 630, 636 (Miss. 1966).

[316] *See* MISS. CODE ANN. § 19-501 (1906); MISS. CODE ANN. § 1-3 (1906).

[317] *Baker,* 327 So. 2d at 291.

[318] *See* MISS. CODE ANN. (1906) at 135-38 (printed immediately after the federal and state constitutions and before the code). The repealer in the code itself appears at page 141. *See* MISS. CODE ANN. § 1-3 (1906).

could] save it from such imputation."[319]

Section 3 of the 1906 Code clearly states that unless the code covers the matter, old laws remain. Section 3 became effective on October 1, 1906. If section 13, effective on April 21, 1906, actually would have repealed on October 1 general laws whose subjects were *not* revised, consolidated, or re-enacted in the code, and were not repugnant to the code provisions, then the code itself became effective just in time to save them.

Repeal language in the Act of Adoption that is inconsistent with the code's own repealer clause also occurred in 1930. Perhaps when the next code was created in 1942, the legislative drafters used the previous Act of Adoption as a template just as the 1930 Code drafters used the 1906 Code repealer language. The supreme court, in discussing repeal issues under these two codes, has sometimes referred to the Act of Adoption language while at other times it has referred to the code language itself. No case was discovered in which the court discussed that there was relevant language in both locations. Therefore there has been no analysis as to which controls the other.

Language almost identical to the repealer in section 3 of the 1906 Code had appeared in every code since at least 1857.[320] The different repeal phrasing of section 13 of the 1906 Act of Adoption was used only one other time and that was in the 1930 Enabling Act.[321] The precedents indicate that the "subjects revised" repealer language was given a common sense meaning. Before the 1906 Code, the court looked to whether the subject of a particular act was included in the code: if not and if there was no repugnancy with anything codified, an earlier uncodified act remained in effect.[322]

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[319] *Baker*, 327 So. 2d at 291.

[320] MISS. CODE ANN. § 1-3 (1857); MISS. CODE ANN. § 1-8 (1871); MISS. CODE ANN. § 1-3 (1880); MISS. CODE ANN. § 1-3 (1892).

[321] 1930 Miss. Laws ch. 210, § 15.

[322] Section 3 of the 1880 Code was applied in these cases: *State v. Woodruff*, 150 So. 760, 771 (Miss. 1933) (Ethridge, J., dissenting); *Moss Point Lumber Co. v. Board of Supervisors*, 42 So. 290, 299 (Miss. 1906) (opinion on rehearing); *Southern Tel. Co. v. Alabama Great S.R. Co.*, 1 Miss. Dec. 489, 489 n.1 (Miss. 1885).

Section 3 of the 1892 Code was interpreted in these appeals: *Henry v. State*, 39 So. 856, 874 (Miss. 1906) (Truly, J., concurring); *State v. Jenkins*, 19 So. 206 (Miss. 1896); *City of Vicksburg v. Sun Mut. Ins. Co.*, 16 So. 257, 258 (Miss. 1894);

Though the 1906 and 1930 Codes each contained two somewhat conflicting repealer clauses, no acknowledgment exists in any discovered opinion that these two separate repealer provisions existed. To review the divergent case law and also to set out that nothing in later codes raises new repeal questions, the codes beginning in 1906 will briefly be discussed.

a. 1906 Code

i. Act of Adoption.[323]

The published code included the Act of Adoption in a prefatory section, which made it the first language on the subject encountered in the code. Section 13 was applied in three cases and none referred to section 3 of the 1906 Code.[324]

ii. Section 3[325]

The supreme court referred to the provision in only one case and did not mention the Act of Adoption.[326]

b. The 1917 and 1927 Hemingway Codes

These were privately compiled codes by Jackson attorney William Hemingway that initially had no official status. Neither code adopted introductory sections such as in the 1906 Code, including section 3 regarding repeal of uncodified acts.

At the first legislative session after the 1917 Code was issued, both judiciary committees were referred the question of whether or not this code should be adopted.[327] Two sessions later, the 1917 Hemingway Code and a 1921 supplement were "adopted as the official compilation of the statutes" of Missis-

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Jones v. Melchoir, 13 So. 857 (Miss. 1893).

[323] 1906 Miss. Laws 78, ch. 101, § 13 ("all laws of a general character not brought forward and embodied . . . shall be thereafter repealed").

[324] Baker v. State, 327 So. 2d 288, 290-91 (Miss. 1976); Conwill v. State, 86 So. 876, 877 (Miss. 1921); Postal Tele. Co. v. Shannon, 44 So. 809 (Miss. 1907).

[325] 1906 MISS. CODE ANN. § 3 ("all acts and parts of acts, the subjects whereof are revised, consolidated, and re-enacted in this code, or repugnant to the provisions contained therein, shall be . . . repealed").

[326] Tucker v. State, 42 So. 798 (Miss. 1906).

[327] 1918 Miss. Laws 463, ch. 510.

sippi.[328] It was not "adopted as the Code of Mississippi," which may mean that the 1906 Code remained in effect in some fashion.[329] A repealer provision appeared in the Hemingway Code: "[A]ny law which may have been, or which would otherwise be, in force, and which has not been included in said code and supplement, is not to be affected by this act, or by the failure to include the law in said code [or] supplement."[330]

c. 1930 Code

i. Act of Adoption[331]

As did the 1906 Code, the printing of the 1930 Code included the Act of Adoption in a prefatory section, which made it the first language on the subject encountered in the code.[332] The supreme court applied this language in several cases and did not mention the code repealer provision.[333]

ii. Section 3[334]

This too was discussed in several cases without the conflicting repealer being cited.[335]

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[328] 1922 Miss. Laws 370, ch. 286, § 1.

[329] Laurel Mills v. Ward, 102 So. 263, 265 (Miss. 1924).

[330] 1922 Miss. Laws 370 ch. 286, § 4.

[331] 1930 Miss. Law, ch. 210, § 15 ("The Mississippi Code of 1930 shall take effect and be in force from and after the first day of November, 1930, and all laws of a general character not brought forward or embodied in said code, except laws granting exemptions from taxation for a period of years, shall be thereafter repealed . . . . ").

[332] MISS. CODE ANN. at 157-62 (1930).

[333] Baker v. State, 327 So. 2d 288, 290-91 (Miss. 1976); *Graham v. State*, 17 So. 2d 210, 212 (Miss. 1944); Gulley v. Lumbermen's Mut. Cas. Co., 166 So. 541, 544 (Miss. 1936) (Ethridge, J., concurring and dissenting); Hunt v. Hunt, 161 So. 119, 120 (Miss. 1935); State Highway Comm'n v. Gulley, 145 So. 351, 353 (Miss. 1933).

[334] MISS. CODE ANN. § 3 (1930) ("From and after [November 1, 1930], all acts and parts of acts, the subjects whereof are revised, consolidated and re-enacted in this Code, or repugnant to the provisions contained therein, shall be, and the same are hereby, repealed . . . .").

[335] Quitman County v. Turner, 18 So. 2d 122, 126 (Miss. 1944) (Smith, C.J., dissenting); Millwood v. State, 1 So. 2d 582, 584 (Miss. 1941) (Smith, C.J., dissenting); State Tax Comm'n v. Miss. Power Co., 160 So. 907, 908 (Miss. 1935).

d. 1942 Code

i. Act of Adoption[336]

ii. Section 14[337]

Section 3 of the 1930 Code was quoted without change, including the November 1, 1930 date. The provision "does not apply to laws enacted subsequent to the code of 1930."[338] Thus the 1942 Code had no independent repeal language. Only one case reference to this section was discovered.[339]

e. 1972 Code

i. The act adopting the 1972 Code did not contain a repeal provision.[340]

ii. Section 1-1-19

All or the parts of any acts, or any sections in the Codes of 1930 or 1942, "the subjects whereof are revised, consolidated and re-enacted in the Mississippi Code of 1972, or repugnant to the provisions contained therein," are repealed.[341]

A repealer clause in the Act of Adoption appeared only in 1906 and 1930. The shifting focus in the supreme court precedents on only one of the parts of the enactment package serves no obvious purpose. Once it is recognized that there is competing language, and if it is then determined that an inconsistency exists and cannot be reconciled, the code repealer controls.

The summary of subsequent codes also reveals that what was not repealed in 1906 was also not repealed by section 3 of the 1930 Code, section 14 of the 1942 Code or section 1-1-19 of the 1972 Code. The 1917 Hemingway Code explicitly repealed

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[336] 1942 Miss. Law ch. 318, § 11, codified in MISS. CODE ANN. § 11 (1942) (if all or any part of a statute passed since 1930 is omitted in the 1942 Code, it remains in effect).

[337] 1942 MISS. CODE ANN. § 14 (1942).

[338] 1942 MISS. CODE ANN. § 12 (introductory note).

[339] *Quitman County*, 18 So. 2d at 126 (Smith, C.J., dissenting) (dealing with both 1930 and 1942 Codes).

[340] 1972 Miss. Laws 446, ch. 394.

[341] MISS. CODE ANN. § 1-1-19 (1972).

nothing that was omitted from it.[342]

3. Potential Revival of Design Statute

Later statutes referring to the state flag might have revived the Flag and Coat-of-Arms Act even if it was repealed. If so, the question of the effect of the 1906 Code would be irrelevant. The best subsequent enactment for this is the 1916 statute that criminalized desecration of the "United States or state flag of the state of Mississippi, or ensign or confederate flag."[343] However, the desecration statute does not usefully describe any of the flags:

> The words "flag," "standard," "color" or "ensign" as used in this subdivision or section, shall include any flag, standard, color, ensign or any picture or representation of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of said flag, standard, color or ensign of the United States of America or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation, may believe the same to represent the flag, colors, standard or ensign of the United States of America or of the state of Mississippi or confederate flag.[344]

This statute is premised on the existence of a state flag, as well as a United States and Confederate flag of identifiable designs. No meaningful description of the state flag is in this statute.[345]

What the revival argument invokes is this constitutional provision: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length."[346] Quoted above is one

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[342] 1922 Miss. Laws 370, ch. 286, § 4.

[343] Act of Apr. 8, 1916, ch. 118, § 1, 1916 Miss. Laws 175 (codified as amended at MISS. CODE ANN. § 97-7-39 (2000)).

[344] MISS. CODE ANN. § 97-7-39 (2000).

[345] *Id.*

[346] MISS. CONST. art. IV, § 61.

statute's definition of "flag."[347] It appears that this was not even an attempt to describe the state flag. Regardless, the definition does not comply with the requirement to insert "at length" relevant portions of the Flag and Coat-of-Arms statute, so the specific prohibition in section 61 was not violated. This means that the legislature could not revive the act by saying only that "the Flag and Coat-of-Arms Act of 1894, to which some question has been raised about its possible repeal, is hereby re-enacted and declared to be in full force and effect." The desecration statute's far less direct manner of unintended revival also would fail.

The need to restate the formerly repealed statute and not just refer to it has been enforced by the judiciary.[348] One precedent held that certain intervening salary statutes could not be repealed and the new compensation "of sheriffs and tax collectors, chancery and circuit clerks and their deputies [were to be] fixed by the laws as they existed on the first Monday in January, 1916."[349] What these officers were to be paid could only be determined by finding the acts that were in effect in January 1916.[350] The 1916 acts provided for compensation to come exclusively from the fees that were collected.[351] Reviving that scheme required that the former statutes be brought forward and "inserted at length" in the new law.[352] The purpose was to avoid surprising provisions from being re-enacted because the new law only referred to and did not restate the old law. Had a short-form description of the state flag appeared, something beyond the quoted sentence, a closer question would exist.[353] Thus, the desecration statute was not a revival of the flag design act even if it needed reviving. Other statutes form even weaker arguments for revival as none have any description of the flag.[354]

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[347] *See supra* note 344 and accompanying text.

[348] Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1297 (Miss. 1992).

[349] Moore v. Tunica County, 107 So. 659, 662 (Miss. 1926).

[350] *Moore*, 107 So. 2d at 662.

[351] *Id.*

[352] *Id.*

[353] *See supra* note 344 and accompanying text.

[354] Act of Mar. 20, 1962, ch. 492, §§ 1-3, 1962 Miss. Laws 856-57 (codified as

The post-1906 statutory references to the state flag almost certainly were not intended to revive the 1894 Act. Instead, the premise of the later statutes is that the 1894 Act still existed. However, since the intent of a later legislature has little relevance to what the 1906 legislature actually did, these later statutes ultimately do not assist in the analysis.

E. Separation of Powers and Doing the Right Thing

The most faithful interpretation of the events of 1906 appears to be that the Flag and Coat-of-Arms Act was not a "general law," and even if it were, the code repealer provision would have preserved it from being undermined by the repealer in the Act of Adoption. In addition, holding that the act was repealed is inconsistent with the supreme court's decision in *Baker* that found it unimportant that the same 1906 Code had omitted a statute creating two judicial districts in Hinds County.[355] Whether or not one agrees with the approach taken in *Baker* of relying on the presumed legislative intent, the same reasoning would apply to what the 1906 legislature did with the Flag and Coat-of-Arms Act.

The jurisprudential impact of the flag decision is minimal. The categorizing of this statute as a general law does not create important precedent. Statutes adopting symbols are *sui generis*, and thus the case can be easily distinguished when other classification issues arise.

Also as explained, the recent codes have not used repeal language similar to that relied upon by the supreme court. Even if another statute arguably repealed in 1906 is discov-

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amended at MISS. CODE ANN. § 3-3-15 (2002) (providing rules for display of flags at public buildings); Act of Dec. 28, 1953, ch. 26, § 8, 1953 Miss. Laws 118, 120 (codified as amended at MISS. CODE ANN. § 37-13-7 (2001) (establishing a pledge of allegiance to the state flag and requiring that it be taught at schools); Act of Dec. 28, 1953, ch. 26, § 7, 1953 Miss. Laws 118, 120 (codified as amended at MISS. CODE ANN. § 37-13-5 (2001) (display of flag at schools and requirement of instruction on history of national and state flags); Act of Apr. 10, 1952, ch. 338, § 2, 1952 Miss. Laws 457, 458 (codified as amended at MISS. CODE ANN. § 75-25-3(1)(c) (2000) (stating that an individual cannot register a mark that consists of the state flag).

[355] *Baker*, 327 So. 2d at 291.

ered, it is quite likely that the 1976 *Baker* approach would be followed. If government has proceeded for one hundred years under the assumption that a statute exists, the actions of the 1906 legislature are likely most of the time to be found unimportant. In an earlier case, a supreme court justice said this about a related flag issue:

> I agree with the majority here . . . that the judiciary is not the avenue to effectuate the removal of the Confederate battle flag from public property. Instead, Mr. Daniels and others like him who are compelled to voice their objection to the battle flag should look to the legislature because the legislature is the primary expositor of this state's public policy.[356]

This analysis remains compelling even after consideration of the repeal issue.

It is hard to avoid the conclusion that the decision even to address the possible inadvertent repeal of the 1894 statute was partly motivated by a conscious or unconscious desire to remove an impediment to progress that the legislative process had failed to eliminate. To use the vernacular, the court may have thought that it should "wipe the slate clean."

Such motivations come up in other contexts, some benign and unexceptional, others more problematic. A statute may have an obvious error. Should it be judicially corrected, or should the legislature be required to make the amendment? The supreme court has been willing to correct simple errors. In one appeal, the court considered a statute that set ad valorem tax amounts for various motor vehicles.[357] The statute had a long list of different dollar amounts for taxes on different kinds of vehicles; all the taxes were *a minimum* of ten dollars.[358] The statute also provided "that in all cases the *maximum tax* for all automobiles, trucks, trailers, and semi-trailers shall be $10.00 per annum."[359] That general purpose clause was inconsistent with the specific provisions providing for taxes much

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[356] Daniels v. Harrison County Bd. of Supervisors, 722 So. 2d 136, 141 (Miss. 1998) (Banks, J., concurring).

[357] Roseberry v. Norsworthy, 100 So. 514, 517 (Miss. 1924).

[358] *Roseberry*, 100 So. at 517.

[359] *Id.* at 516.

higher than ten dollars.[360] The court said that the use of "maximum" instead of the word "minimum" was "a mere clerical error, and, such being the case, the strict letter of the statute should yield to the obvious intent, and it is the duty of the court to effectuate this obvious intention and purpose, even to the extent of correcting this manifest error in the language used."[361]

Corrections of such obvious and simple errors may intrude on legislative function but without serious repercussions if the courts use such power sparingly. More problematic are suggestions that a court has power to "correct" a statute that has become obsolete or impractical for modern times. There is an occasionally recognized doctrine of "desuetude," that statutes and rules long ignored and perhaps disfavored—such as an 1879 Connecticut statute that in the 1960's continued to criminalize the use of contraceptives—may cease to have force because of long disuse.[362] However, courts rarely directly apply the doctrine.

Perhaps accordingly, in fast-changing areas such as with transportation, a statute that was figuratively and perhaps even literally based on a horse and buggy age may become technologically outmoded. A Mississippi highway safety statute first adopted in 1938 still remains in effect, though it was adopted before many paved roads and traffic control devices at intersections existed, and for that matter, before there was almost universal use of motorized vehicles. It spoke of safety measures that are no longer appropriate:

> The driver or operator of any motor vehicle must decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding road-

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[360] *Id.* at 517.

[361] *Id.*

[362] Poe v. Ullman, 367 U.S. 497, 503-05 (1961) (Frankfurter, J., concurring). This concept was explored at some length in ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS Ch. IV (1962); *see also* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values With Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

> way, or when a special hazard exists with respect to pedestrians or other traffic.[363]

Few drivers on paved through roads are today slowing at every rural road or city street intersection in which no traffic light nor other control device is placed. Still, the statute has been argued to create the usual negligence *per se* standard when a collision occurs in such circumstances. The supreme court has given some attention to the impracticalities of the rule, but has never tried to repeal the statutory language.[364] A concurring opinion from the court of appeals discussed those impracticalities and urged legislative, not judicial repeal.[365]

When the judiciary itself has created a legal doctrine, it feels even less constrained in altering or eliminating it. The Supreme Court in 1982 altered the long-existing doctrine of sovereign immunity for the express reason that it was out of date and did not conform to modern legal concepts.[366] The court stated, "We conclude that the doctrine is unfair and unsuited to the times and that this Court has power to abolish the doctrine."[367] What is relevant here is that among the reasons cited for abolishment is that a provision in the 1890 constitution provided that "every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law."[368] Despite that for one hundred forty years constitutional provisions such as this had not been considered an impediment to sovereign immunity,[369] the court now deter-

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[363] MISS. CODE ANN. § 63-3-505 (1996) (originally enacted as 1938 Miss. Laws 200, § 51). This statutory requirement to decrease speed was applied to a driver on a through highway in a rural area who did not know that a stop sign on an intersecting road had been knocked down. Classic Coach, Inc. v. Johnson, 2000-CA-00692-SCT, ¶¶ 24-32, 823 So. 2d 517, 524-25 (Miss. 2002).

[364] Richardson v. Adams, 223 So. 2d 536, 538 (Miss. 1969).

[365] Greyhound Lines, Inc. v. Sutton, 97-CA-00634-COA, ¶¶ 58-68, 753 So. 2d 1105, 1120, 1124-26 (Miss. Ct. App. 1999) (Southwick, P.J., concurring; opinions withdrawn upon granting of cert.), *aff'd in part, rev'd in part*, 765 So. 2d 1269 (Miss. 2000).

[366] Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982).

[367] *Pruett*, 421 So. 2d at 1049.

[368] *Id.* at 1048 (quoting MISS. CONST. art. III, § 24 (1890)).

[369] Sovereign immunity was first recognized in Mississippi in 1844. Yalobusha County v. Carby, 11 Miss. 529 (1844). The identical constitutional provision cited

mined that it was.[370]

The best known proponent of giving courts the power to update statutes is Yale Law School Professor and former dean, Guido Calabresi. He has suggested "granting to courts the authority to determine whether a statute is obsolete," the result of which could be to "update the statute directly by replacing it with new rules, . . . or do no more than create a situation in which conscious legislative reconsideration of the law was made likely."[371] As some statutes aged, they "no longer served current needs or represented current majorities," leaving them inconsistent with "a new social or legal topography."[372] He argues that courts now remove obsolete statutes through "subterfuges, fictions, and willful use of inappropriate doctrines," such as through strained construction and questionable constitutional invalidation.[373] From the perspective of academia, Dean Calabresi suggests that the only legitimate choice is whether courts update statutes indirectly and deviously or instead do so candidly—"living with anachronistic statutes is not really an option."[374] In some situations, if judicial "limits of honest interpretation are too constricting," a court could deliberately misread a statute in order to bring about the desired results.[375] The method to the concept is this:

> As a practical matter, the courts can do any of several things when they have decided that an old rule is out of phase. They can strike down the existing rule and substitute a new one. They can strike down the rule and declare a new rule not of their own making to be applicable . . . . They can strike down the existing rule and begin a process of developing a new rule (allowing later courts, agencies, or legislatures to flesh out.) They can revise part of the old rule and leave the rest in a

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in *Pruett* has existed in all Mississippi constitutions. MISS. CONST. art. III, § 24 (1890); MISS. CONST. art. I, § 28 (1869); MISS. CONST. art. I, § 14 (1832); MISS. CONST. art. I, § 14 (1817).

[370] *Pruett*, 421 So. 2d at 1049.

[371] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1982).

[372] *Id.* at 6.

[373] *Id.* at 166.

[374] *Id.* at 110 & 160-61.

[375] *Id.* at 34 & 38.

> state of uncertainty—to be reaffirmed or revised, either legislatively or judicially, in the future. Finally, they can strike down a rule and leave no rule in effect at all.[376]

Dean Calabresi develops his theory in much greater detail than shown here. He suggests that the legislature for the jurisdiction may adopt a statute authorizing judicial intervention in this manner, which he finds would remove the constitutional objections that he "cannot take . . . very seriously" anyway.[377] The likelihood of such willing power-sharing appears to be minimal.

Needless to say, such a herculean role for courts is controversial. One federal judge, Richard Posner of Chicago, has both constitutional and practical doubts about the approach: "The main objections to [Calabresi's] approach are that it greatly exaggerates the courts' ability to legislate intelligently—and the judgment whether a statute has outlived its usefulness is a legislative rather than a judicial judgment . . . ."[378] The interest group pressures behind initial passage, the public support that currently exists for retention, and the utility of the statute are not within the competence of judicial evaluation.[379]

Perhaps the Mississippi Supreme Court simply concluded that the flag design statute had been repealed by the adoption of the 1906 Code. The analysis was unnecessary to the result, did not respond to an issue raised or briefed in the appeal, and was incomplete. The desire may have been to wipe cleanly from the legislative slate a divisive public issue. Under the controlling principles of the law of unintended consequences, the court's decision did not resolve the issue, as is discussed in the postscript below. The court could be seen as Calabresian to the extent that it "create[d] a situation in which conscious legislative reconsideration of the law was made likely."[380] Separation of powers as expressed by Jeffersonian and the Anti-Federalist writings would give no role to the judiciary for repairing

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[376] CALABRESI, *supra* note 371, at 147-48.

[377] *Id.* at 114.

[378] RICHARD A. POSNER, THE FEDERAL COURTS 290-91 (1985).

[379] *Id.* at 291.

[380] CALABRESI, *supra* note 371, at 2.

statutes that the legislature itself will not fix.

The United States Supreme Court used an apt image when it stated that there is a "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . ."[381] That pressure may have been in operation here.

F. Postscript

Once the slate was wiped clean, the battle over what to write, or more aptly, what to draw and color, began. The governor named a commission to study and make proposals regarding a flag.[382] It endorsed a design that was similar to the 1894 flag, but with a circle of stars substituted for the St. Andrew's Cross. The commission sensed the practicality of a popular referendum on the choice and proposed that the legislature hold a special election so that the public could choose.[383] A 2001 statute delegated to the voters a choice between two flags.[384] On April 17, 2001, two weeks less than a year after the Mississippi Supreme Court declared that the flag had lost its official status, 64.4% of the voters in a statewide special election chose the 1894 flag design.[385] Once that choice was made, it automatically became part of the Mississippi Code by operation of the original enactment that had set the referendum.[386]

III. WHAT'S A CONSTITUTION AMONG FRIENDS? A LEGISLATIVE MINORITY SEEKS JUDICIAL HELP

Seven state senators at the end of the 2000 legislative session alleged that the presiding officer of the senate had

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[381] INS v. Chadha, 462 U.S. 919, 951 (1983).

[382] Mario Rossilli, *Future of Flag on Line*, CLARION-LEDGER (Jackson, Miss.), May 6, 2000, at 1A.

[383] Emily Wagster, *Commission Favors New Flag*, CLARION-LEDGER (Jackson, Miss.), Dec. 13, 2000, at 1A.

[384] 2001 Miss. Laws ch. 301, § 1.

[385] 2000-2004 MISS. REG. 658 (2001).

[386] 2001 Miss. Laws ch. 301. The flag design statute was codified as MISS. CODE ANN. § 3-3-16 (Supp. 2002).

violated the provision requiring that a "bill" be read aloud prior to final passage when that is requested by any member. The lieutenant governor ruled that conference reports were not "bills." A chancellor interpreted the reports to be "bills" and issued a mandamus requiring their oral reading, but that was stayed pending appeal to the Mississippi Supreme Court.[387]

Obviously, no senator needed to have a bill read aloud in the chamber. Indeed, there is no certainty that had the lieutenant governor ruled in favor of the request, the requesting party would have stayed while some clerk droned on in oral reading. This was the utilization of a constitutionally-mandated internal legislative procedure in order for some senators to achieve a goal unrelated to the procedure itself. Whatever that goal might have been, the threat or reality of delay caused by reading lengthy documents was a means thought useful in reaching it.[388]

A. Origins of Suit

The place to begin is with an understanding of what brought the litigation to the Mississippi Supreme Court. Mississippi's regular legislative sessions are limited by the constitution to ninety calendar days, except for the session immediately after a gubernatorial election as was the session in 2000, which may be 125 days.[389] Throughout the session, business is driven in part by firm deadlines of the calendar for actions by the different houses. As the time period for the entire session draws to a close, options are limited both for leaders and for members: a measure is either passed on time, or it fails. What may have become something of a tradition in the legislature is that some of the most important measures, name-

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[387] *In re* Amy Tuck, 2000-M-00712 (Miss. May 4, 2000) (applying MISS. CONST. art. VI, §59 in order granting stay). The stay order is referenced in *Tuck v. Blackmon,* 2000-CA-00759-SCT, ¶ 4, 798 So. 2d 402, 405 (Miss. 2001).

[388] Emily Wagster, *Ruling Leaves Senate Actions in Question*, CLARION-LEDGER (Jackson, Miss.), May 5, 2000, at 1A, 6A. Plaintiff and senator Barbara Blackmon said that the haste in which major budget bills were presented at the end of a session meant that senators "were not able to tell what we were voting on. We were not interested in the reading of bills." *Id.*

[389] MISS. CONST. art. IV, § 36.

ly the appropriation bills, are resolved in small conference committees near the close of the session and then presented in all their mammoth majesty to the rest of the legislators. Those legislators in turn have little opportunity to become familiar with the minutia of these intricate measures. Perhaps one hundred budget measures were being presented this way at the end of April 2000, with the session required to end in just a few days.[390]

One of the senators, Barbara Blackmon, made a point of order in the next to last week of the session: "whatever that is going to be passed into law, whatever is going to pass into the state statute, or whatever the Governor is going to sign, be read in full before final passage."[391] Among the detailed parliamentary rules that perhaps unfortunately are set out in the constitution, is the requirement in section 59 that "every bill shall be read in full immediately before the vote on its final passage upon the demand of any member."[392] Senator Blackmon's rather broad words perhaps were intended to avoid placing any specific label on the measures to which she wanted her request to apply. That could be because she was anticipating the lieutenant governor's ruling that the conference reports containing the final appropriation proposals were not "bills" as required in section 59. A few days after the Lieutenant Governor declared these measures not to be "bills," suit was filed.

The deadline for action on the conference reports, a deadline controlled by the required *sine die* adjournment of the legislature no later than 125 calendar days after it began, was at 6:00 P.M. on Monday, May 1. On Sunday afternoon, April 30, Senator Blackmon and six other senators[393] filed a request for a temporary restraining order in Hinds County Chancery Court. The defendant was Lieutenant Governor Amy Tuck, whose ruling had blocked the reading of the conference reports

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[390] Wagster, *supra* note 388, at 6A.

[391] *Blackmon*, 2000-CA-00759-SCT ¶ 2; 798 So. 2d at 404.

[392] MISS. CONST. art. IV, § 59.

[393] The plaintiffs were Barbara Blackmon, Robert Johnson, John Horhn, Willie Simmons, Johnnie Walls, David Jordan and Sampson Jackson. *Blackmon*, 2000-CA-00759-SCT, 798 So. 2d at 402.

a few days earlier.[394] On the next day, the deadline day for passage, the chancellor granted the relief.[395]

B. The Appeal

The supreme court noted later in its opinion on the appeal:

> In less than forty-eight hours, the proceeding in the chancery court had gone from the filing of the complaint to a final declaratory judgment. At risk were over one hundred appropriation bills and over $170,000,000 in appropriation and bond measures.[396]

The supreme court, later on the same afternoon as the chancellor entered the temporary restraining order, granted an emergency stay requested by the lieutenant governor. Ten months would pass as more careful briefing allowed the merits to be decided with some deliberation.

1. Principal Precedents

The parties in their supreme court briefs debated at some length the significance of an 1892 precedent, *Hunt v. Wright*.[397] The senators who objected to the lieutenant governor's ruling sought to distinguish *Hunt* or have it overruled. The lieutenant governor wanted *Hunt* followed rather precisely. Understanding what that 1892 case held is our next step.

Hunt contains a substantial discussion of the effect of the legislative procedural rules that are set out in much too great of detail in the Mississippi Constitution. Included are such matters as the procedures for introducing bills, the making of amendments, the reconsideration of votes, and even that there must be a title on each bill.[398] The constitution was adopted

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[394] *Id.* ¶ 1, at 402. A writ of mandamus and a permanent injunction were sought in addition to the temporary restraining order.

[395] *Id.* ¶ 3, at 402.

[396] *Id.* ¶ 3, at 405.

[397] Briefs of Appellant and Appellees, *Blackmon*, 2000-CA-00759-SCT, 798 So. 2d at 402; Hunt v. Wright, 11 So. 608, 610 (Miss. 1892).

[398] MISS. CONST. art. IV, §§ 54-77. One authority noted that these provisions "went further than most constitutions go" by prescribing legislative rules of proce-

in 1890. Two years later, the Mississippi Supreme Court in *Hunt v. Wright* held that many of these rules were beyond the oversight authority of the courts.[399] Which rules were judicially manageable and which were not were with some care distinguished by Chief Justice J.A.P. Campbell this way:

> The constitution, as to mere rules of procedure prescribed for the [L]egislature, is committed to the members individually and collectively, and the houses are intended as a mutual check, and the [G]overnor on both, and courts will not inquire into the antecedents of legislative enactments, and have no claim to be present at the parturition. This duty begins when legislative travail is over."[400]

The court found that the courts had no role to play in enforcing procedural rules that applied only during the labor that produced legislation. Only after statutory birth do the courts become involved. To continue the metaphor, perhaps not unduly, I suggest that under *Hunt* courts are not midwives assisting in delivery. They are specialists called in only for postpartum care.

The 1892 court in *Hunt* listed sections of the constitution regarding legislative procedures that are subject to judicial evaluation:

> Among [the "Legislative Department" section] is found, "Rules of Procedure," and under this subdivision are grouped sections 54 to 77, inclusive . . . . Among these provisions are certainly some that are not mere rules of procedure addressed to and ending with the members of the legislature. An example of this is found in section 61: "No law shall be revived or amended by reference to its title only," etc. An act of the legislature disregarding this would be disregarded by the courts. That would present the question of the validity of the completed enactment. Another example is section 63: "No appropriation bill shall be passed . . . which does not fix definitely the maximum sum thereby authorized to be drawn from the treasury."

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dure. GEORGE H. ETHRIDGE, MISSISSIPPI CONSTITUTIONS 176 (1928).

[399] *Hunt*, 11 So. at 610.

[400] *Id.*

> Another is section 64: "No bill . . . to make appropriations . . . out of the state treasury shall continue in force more than six months after," etc. Section 75 is: "No law of a general nature, unless there in otherwise provided, shall be enforced until 60 days after its passage." These provisions pertain to the operation of acts of the legislature passed with due regard to all the requirements of the constitution, and would seem to be out of place among rules of procedure. With those matters courts must deal, but their duty as to them, as in all other cases, commences after the termination of legislative action.[401]

Hunt itself considered section 68 of the constitution that prohibited passage of an appropriation or revenue bill during a session's last five days. "While the provision of section 68 is obligatory on the legislature, [the legislature's] disregard of it is beyond the reach of courts, which are not keepers of the consciences of legislators, and deal only with what they do, and not what they should have done or omitted."[402]

Other cases followed *Hunt* that examined other constitutionally mandated, but perhaps not judicially enforceable rules of legislative procedure. Initially it appears that *Sample v. Town of Verona*[403] may be inconsistent with the case that it does not cite, *Hunt*. The court held that the failure of a bill to have any title was fatal to its effectiveness.[404] The constitution requires this:

> Every bill introduced into the [L]egislature shall have a title, and the title ought to indicate clearly the subject-matter or matters of the proposed legislation. Each committee to which a bill may be referred shall express, in writing, its judgment of the sufficiency of the title of the bill, and this, too, whether the recommendation be that the bill do pass or do not pass.[405]

A title becomes part of the actual enactment, appears in

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[401] *Id.* at 609-10.
[402] *Id.* (applying MISS. CONST. art. IV, § 68).
[403] 48 So. 2 (Miss. 1909).
[404] *Sample*, 48 So. at 3.
[405] MISS. CONST. art. IV, § 71.

the *General Laws of Mississippi* though not in the code, and is considered relevant in determining the meaning of the statute.[406] The absence of any title invalidated the statute since "it is somewhat difficult to conceive how any express constitutional limitation on the power of the Legislature can be regarded as directory only, and certainly such provisions are everywhere else deemed to be mandatory, requiring the courts to pronounce invalid all statutes in violation thereof."[407]

The case of *Sample v. Town of Verona* did not consider a statute but instead a city ordinance that was passed under statutory authority that also required that an ordinance contain a title.[408] Thus section 71 was used solely as an analogy. *Sample* was soon followed by a case in which an act's title was solely a list of twenty-one existing statutes that it was amending or repealing, without any other indication of the subject matter. One additional statute that the act amended was omitted from the title's list. The court in *Board of Levee Commissioners v. Royal Insurance Co.*[409] held that if the "title makes no other reference to the subject of the act than by sections of the Code to be amended or repealed, then no other sections than those named in the title can be dealt with in the body of the act."[410] The court did not find the act otherwise defective, but it could not effectively amend the statute that had not been referenced in the title.

Whether a title, which follows the enactment as part of the official passage, is a pre- or post-parturition matter as defined in *Hunt* might be disputed. A later case that considered a title that was allegedly defective brings some clarity. In *City of Jackson v. State*,[411] the court held that the judiciary does not have a role in addressing the adequacy of a bill's title.[412] This decision might be seen as a retreat from the *Board of Levee Commissioners* decision. The *City of Jackson* court stated that

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[406] *See* Lewis v. Simpson, 167 So. 780, 781 (Miss. 1936).
[407] *Sample*, 48 So. at 3 (quoting 26 A. & E. ENCYCLOPEDIA LAW 572 (2d ed.)
[408] *Id.* at 2-3.
[409] 51 So. 2, 2 (Miss. 1910).
[410] *Bd. of Levee Comm'rs*, 51 So. at 2.
[411] 59 So. 873, 873-74 (Miss. 1912).
[412] *City of Jackson*, 59 So. at 873-74.

if *Board of Levee Commissioners* decision was "construed to hold that the courts are empowered to nullify acts of the Legislature because, in the opinion of the court, the title does not indicate all it should indicate, we decline to follow it."[413]

In *City of Jackson*, the court found guidance for its decision not to review title adequacy by considering the arrangement of the separate sections of the constitutional articles by the legislature.

> Article 4 is thus subdivided: (1) "Legislative department." (2) "Qualifications and Privileges of Legislators." (3) "Trial of Officers." (4) "Rules of Procedure." (5) "Injunctions." (6) "Local Legislations." (7) "Prohibition." (8) "Miscellaneous." It will be noted that sections 71 and 74 are placed under the subject, "Rules of Procedure." It is observable that section 74 [requiring that each bill be referred to a committee] employs the prohibitive words, "No bill shall become a law," and yet, under the decisions of this court, the enforcement of this section is not a judicial question, and the courts have no power to control the observance by the Legislature of this section.[414]

The court in reliance on *Hunt* found that "mere rules of procedure" are the responsibility of the legislators themselves; the governor also has the power to consider them by vetoing a bill whose passage may have failed to follow a necessary procedure.[415] The fact that a section of the constitution requires that another branch of government perform its internal functions in a certain way was not enough to trigger judicial oversight. However, "an act without a title would not be a law—and the violation of the Constitution would thus appear upon the face of the act."[416] Section 71 itself, after stating that each bill must have a title, then only uses the word "ought" to describe what is to be in the title. "'Ought' is a shade stronger than should,' but 'a shade is not to be seized to nullify an act of

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[413] *Id.* at 874.

[414] *Id.* at 873-74; *see* Giles v. Friendly Finance Co. of Biloxi, 185 So. 2d 659 (Miss. 1966) (sufficiency of title); Matthews v. State, 126 So. 2d 245 (Miss. 1961) (sufficiency); Lewis v. Simpson, 167 So. 780 (Miss. 1936) (sufficiency).

[415] *City of Jackson*, 59 So. at 874 (citing Hunt v. Wright, 11 So. 608, 610 (Miss. 1892)).

[416] *Id.*

the Legislature.' It is quite manifest that the words were carefully selected and advisedly used, the one being mandatory and the other admonitory, or advisory."[417] In later cases the sufficiency of a bill's title was found not to be a proper matter for judicial review.[418]

One last challenge will be considered. In *Barnes v. Ladner*, [419] brought by a voter, the alleged defective procedure was the failure of the Mississippi House of Representatives to comply with section 65 of the constitution, which required that "all votes on the final passage of any measure shall be subject to reconsideration for at least one whole legislative day."[420] As to the "right to work" constitutional amendment being challenged, the voter alleged that the motion for reconsideration was tabled on the same day as the final passage of the resolution proposing the amendment.[421] The court refused to delve into the matter. The "Legislature, as a coordinate department of the state government, is not subject to supervision and revision by the courts as to those rules of procedure prescribed by the [c]onstitution for its observance."[422] These are the precedents with which the supreme court had to operate when *Tuck v. Blackmon* was decided in 2001.[423]

2. The Mississippi Supreme Court's Analysis

In *Blackmon*, the supreme court did not follow *Hunt*, though it was cited.[424] The distinction between rules of proce-

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[417] *Id.*

[418] Giles v. Friendly Finance Co., 185 So. 2d 659, 662 (Miss. 1966) ("The sufficiency of the title of an act is solely for the legislature, and may not be questioned by the courts."); Matthews v. State, 126 So. 2d 245, 247 (Miss. 1961) (requirement that every bill have a title to indicate its subject matter is "directory to the legislature, not mandating"); Lewis v. Simpson, 167 So. 780, 781 (Miss. 1936) (presuming that the legislature attempted to comply with constitution provision stating that proposed legislation is to have a title indicating its subject matter).

[419] 131 So. 2d 458 (Miss. 1961).

[420] MISS. CONST. art. IV, § 65.

[421] *Barnes*, 131 So. 2d at 460.

[422] *Id.* at 461.

[423] *See supra* notes 397-422 and accompanying text.

[424] *See* Tuck v. Blackmon, 2000-CA-00759-SCT, ¶ 7, 798 So. 2d 402, 406 (Miss.

dure that are solely for internal legislative enforcement and those that affect the bill after passage was not discussed. No longer was determining the propriety of the legislative decision as to the meaning of any of its own rules beyond judicial review, but the power to declare the legislative interpretation in error would be sparingly used: "An interpretation by the Senate of the extent of its power under the Constitution, while not binding on the courts, should be accepted unless manifestly wrong."[425] This was a profound change affecting the understanding of separation of powers.

In support of the new position, the court cited two cases that are not part of the *Hunt* line of authorities, *Witherspoon v. State* ex rel. *West*[426] and *Dye v. State* ex rel. *Hale*.[427] Each dealt with legislative action other than the passage of bills and neither even cited *Hunt*. In 1925, Chief Justice Sydney Smith wrote in *Witherspoon*, that the state senate's view of whether that body had the right to reconsider its confirmation of a gubernatorial nomination was persuasive but not binding.[428] In the other cited case, *Dye*, Justice James L. Robertson found that the senate's view of the powers that it could grant to its presiding officer, the lieutenant governor, was to be considered but was not controlling over whether a constitutional violation occurred.[429] These precedents raised separation of powers issues far beyond purely procedural rules for the passage of legislation. Whether a gubernatorial nominee has been confirmed, or whether the lieutenant governor can be in both the legislative and in the executive branch are not procedural rules questions in the *Hunt* mold.

The *Blackmon* court then turned to *Hunt*. It discussed the principal precedent used in the 1892 *Hunt* case, *Ex Parte*

2001).

[425] *Blackmon*, 2000-CA-00759-SCT, ¶ 6, 798 So. 2d at 406 (quoting Witherspoon v. State *ex rel.* West, 103 So. 134, 138-39 (Miss. 1925), and citing Dye v. State *ex rel.* Hale, 507 So. 2d 332, 345 (Miss.1987)).

[426] 103 So. 134 (Miss. 1925).

[427] 507 So. 2d 332 (Miss. 1987).

[428] *Witherspoon*, 103 So. at 138-39.

[429] *Dye*, 507 So. 2d at 338-39, 345.

Wren.[430] The court in *Blackmon* repeated the *Wren* court's statement that the judiciary does not even have the power to resolve certain legislative procedural issues: "It is the admitted province of the courts to judge and declare if an act of the legislature violates the constitution, but this duty of the courts begins with the completed act of the legislature. It does not antedate it."[431]

The *Tuck* decision also quoted the *Hunt* court's statement that the legislature's compliance with its constitutional procedural rules is

> not subject to supervision and revision by the courts as to those rules of procedure prescribed by the constitution for its observance, because, while those rules are all authoritative and mandatory to legislators, who are sworn to note and observe them, they exhaust themselves upon legislators, and are not for the consideration of courts.[432]

Despite these references to the absolute bar of judicial review, the court found that the 1987 *Dye* decision changed *Hunt v. Wright*. "The rule annunciated in these cases and refined by *Dye* is a statement of the well precedented and respected political question doctrine itself grounded in prudent judicial restraint."[433] "Political question" analysis is a rule of respectful deference by the judiciary to one of the other branches of government. Deference is still power, though. However, the *Hunt* court said there was no power. Though the "political question" label is one largely of federal practice, it was most notably used in Mississippi case law by Justice James Robertson's opinion in *Dye* recognizing that Mississippi's constitution allowed the lieutenant governor to exercise legislative powers:

> Lt. Gov. Dye also attacks the Circuit Court's jurisdiction on the grounds that this case involves a political question and therefore a non-justiciable controversy. Specifically, Dye ar-

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[430] 63 Miss. 512 (1886).

[431] *Blackmon*, ¶ 7, 798 So. 2d at 406 (quoting *Wren*, 63 Miss. at 512)).

[432] *Id.* (quoting *Hunt*, 11 So. at 609).

[433] *Id.* ¶ 8, 798 So. 2d at 407 (citations omitted).

> gues that courts have no authority to examine rules of procedure passed by a legislative body for the governance of its own deliberations, since each body is supreme within the powers conferred by the Constitution.
>
> Sens. Hale and Taylor counter with the argument that their suit presents a claim of rights arising under the Mississippi Constitution of 1890 and as such can only be decided by the Judicial Department of this state's government.
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> Without doubt we will as a general rule decline adjudication of controversies arising within the Legislative Department of government where those controversies relate solely to the internal affairs of that department. On the other hand, legislators nor the bodies in which they serve are above the law, and in those rare instances where a claim is presented that the actions of a legislative body contravene rights secured by the constitutions of the United States or of this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that our final judgment may have practical political consequences.[434]

The inappropriateness of certain subject matter for resolution by the courts has been designated by the United States Supreme Court as "nonjusticiability."[435] Among the primary reasons for an issue not to be justiciable is because it involves a "political question." The case of *Baker v. Carr*[436] revised the political question doctrine, since the legislative reapportionment involved in *Baker* had previously been considered beyond the proper reach of the courts.[437] The new contours of the doctrine were now said to be this:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for

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[434] *Dye*, 507 So. 2d at 338-39 (citations omitted).
[435] *See* Baker v. Carr, 369 U.S. 186, 198 (1963).
[436] *Baker*, 369 U.S. at 186.
[437] *Id.* at 195-96.

> nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[438]

It is obvious that the fact that litigation is directly against another department of government, or that the suit involves political matters, does not render the subject matter nonjusticiable. Justice Robertson in *Dye* found that when

> it is alleged that one arguably a member of the Executive Department of government is exercising powers properly belonging to the Legislative Department, we are of necessity called upon to decide whether the encroachment exists in fact and, if so, whether it contravenes the mandate of Sections 1 and 2 of our Constitution that the powers of government be separate.[439]

The encroachment referenced in *Dye* and the similar concept of "aggrandizement" were first mentioned by the United States Supreme Court in *Buckley v. Valeo*.[440] The court may not have intended to create two separate categories by using two words, but later opinions and academicians have managed to do so. "Encroachment" usually is considered to be the legislature's placing of limits on another branch's exercise of its constitutionally assigned powers without attempting to assume those powers itself.[441] "Aggrandizement," on the other hand, is one branch's attempt to seize some part of the power belonging to one of the other branches.[442] In both cases, one branch has sought to weaken another; the distinction is whether the aggressive branch has just attempted to get in the way of an-

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[438] *Id.* at 217.

[439] *Dye*, 507 So. 2d at 339.

[440] 424 U.S. 946 (1976).

[441] K.G. Jan Pillai, *In Defense of Congressional Power and Minority Rights under the Fourteenth Amendment*, 68 MISS. L.J. 431, 505 n.374 (1998).

[442] *Id.*

other branch's exercise of power or has actually attempted to acquire power for itself.

The legislature's giving of legislative powers to its own presiding officer, when that officer may be part of the executive branch, does not appear to be either encroachment or aggrandizement. Rather, giving an officer of another branch some of your own power might be considered abnegation.

The constitution imposes on the legislature certain procedural requirements; each house also has adopted additional rules. *Blackmon* declares that compliance with all of these rules may be reviewed by the courts, but no relief would be given without an exceptional showing by the complaining party.[443]

In *Blackmon*, after deciding that the specific issue was subject to judicial review, the court examined the constitutional provision for oral reading of bills, and reviewed a variety of authorities on the issue. The court concluded that "[i]t is impossible for us to say that [the lieutenant governor's] ruling was arbitrary or manifestly wrong."[444] The announcement for the future was quite un-*Hunt*ish. "Our law recognizes the pernicious consequences of unwarranted intrusion by the judiciary into the legislative process, and we will in the absence of compelling justification leave disputes within the deliberative bodies as to their practices and procedures decided by those bodies."[445] At least in *Blackmon*, the supreme court no longer accepted that judicial review is unavailable as to the application of legislative procedural rules that antedate the "parturition" of a statute.

C. Separation of Powers Implications

Obviously, the assumption by one branch of the authority to oversee the internal operations of another branch has sepa-

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[443] Tuck v. Blackmon, 2000-CA-00759-SCT, ¶ 8, 798 So. 2d at 402, 407 (stating that only when the legislature applies its rules "in a manifestly wrong manner which does critical harm to the legislative process is judicial intervention justified").

[444] *Blackmon*, ¶ 14, 798 So. 2d at 409.

[445] *Id.* ¶ 18, 798 So. 2d at 410.

ration of power ramifications. *Hunt* limited its oversight to situations that were not solely internal. The courts would review compliance with constitutional procedural requirements such as the requirement that statutes not be reviewed by reference, or the constitutional time limits placed on appropriation bills, when those requirements affected the operation of the bill, not just its passage.

There is nothing inherently revolutionary to the placement of limits on judicial oversight of other branches. There was no initial concept under separation of powers principles that every act of every government actor had to be subject to judicial review. There are constitutional requirements on the manner in which the legislature operates. There are also requirements for the executive such as to give "from time to time" reports to the legislature on "the state of the government, and recommend for consideration such measures as may be deemed necessary and expedient."[446]

May the judiciary issue a mandamus requiring that the governor give the report if it decides too much time had passed since the last one? And if giving no report at all is in the category of *Sample*,[447] which voided a bill that had no title at all, could the court decide that even if the governor gave a report, that it did not conform with the constitutional requirement?[448] The constitutional obligations of the judiciary include not reversing a judgment solely because the case was brought in chancery court when it should have been brought in circuit court.[449] If the supreme court nonetheless issued an opinion that reversed solely for that reason, should there be a remedy from some other branch? The remedy would only be through the political process, both by voters and potentially by

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[446] MISS. CONST. art. V, § 122.

[447] Sample v. Verona, 48 So. 2 (Miss. 1909).

[448] The legislature itself declared a constitutional violation when it returned a report to the governor saying that it was a campaign document that complied with the directive to provide information on the state of the state; it "would be pleased to receive from his Excellency" the proper report. MISS. SEN. J. 28-30, 37 (1876). That rebuke was given a matter of days before impeachment proceedings began, though on other grounds. *Id.*

[449] MISS. CONST. art. VI, § 147.

impeachment. *Hunt* had held that the legislature had an unreviewable area of behavior.[450] The *Hunt* view was that since the legislature was a coequal branch, correctives other than litigation would be necessary for those errors.[451]

Certainly *Hunt* granted to the legislature itself the final enforcement of most procedural rules, even constitutional ones. The constitutionally required procedures that are left solely to the legislature for enforcement affect internal operations and are felt during a bill's consideration and prior to presentment to the governor. However, if the constitutional obligation applies to the interpretation or operation of the statute itself, then the courts have a role to play that "commences after the termination of legislative action."[452]

There are internal mechanisms at the legislature for challenging procedural rulings:

> Every point of order shall be decided by the presiding officer. Any decision of the presiding officer on a point of order shall be subject to an appeal to the Senate without debate, unless the presiding officer, in his discretion and for his information, requests debate and/or a brief on any point of order. He may require points of order in writing and may take reasonable time to examine and study same before ruling thereon, during which period consideration of that particular subject matter shall be suspended without prejudice and the Senate shall proceed to the next order of business.[453]

This mechanism was not utilized by the seven litigating senators, perhaps because they concluded that the majority of the members supported the ruling.[454] The court in *Blackmon* held that the courts are available as an alternative to internal resolution, though the review is deferential.[455]

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[450] Hunt v. Wright, 11 So. 608, 609 (Miss 1892).

[451] *See Hunt*, 11 So. at 609.

[452] *Id.* at 610.

[453] MISS. SEN. R. 112.

[454] Andy Kanengiser, *Petition Supports Tuck in Suit*, CLARION-LEDGER (Jackson, Miss.), Sept. 1, 2000, at 1B (stating that thirty of the fifty-two senators signed a petition supporting Lieutenant Governor Tuck's position in the litigation).

[455] Tuck v. Blackmon, 2000-CA-00759-SCT, ¶ 1, 798 So. 2d 402, 404 (Miss. 2001) (holding that "only after heightened consideration and under exigent circum-

The *Hunt* opinion is consistent with the original purpose of Mississippi's separation of powers provision, which was to avoid concentrating power in any one branch. Thomas Jefferson, the author of the language in the original provision adopted in Mississippi, stated that the concentration of governmental power "in the same hands is precisely the definition of despotic government."[456]

Among the most thoughtful Anti-Federalist writers was *Brutus*. He described judicial power:

> It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the court of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. . . .
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> . . . And the courts are vested with the supreme and uncontroulable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute [enforce] a law, which, in their judgment, opposes the constitution . . . . The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined.[457]

No more pointed explanation of the power to declare statutes unconstitutional appears in the Anti-Federalist writings or in the *Federalist Papers*, but *Brutus* was not addressing rules of legislative procedure. What are necessary and proper statutes in light of the delegated powers could be seen as the focus. Indeed, there are few federal constitutional rules of procedure. The constitution does not present detailed procedural rules, but simply provides that each of the houses determines its own rules for its proceedings.[458]

Mississippi's first constitution did not have many more

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stances will judicial authority to regulate the internal actions of the Legislature be granted").

[456] Thomas Jefferson, *Notes on the State of Virginia*, *reprinted in* THOMAS JEFFERSON WRITINGS 1781-1782, 245 (Merril D. Peterson ed., 1984).

[457] STORING, 2 THE COMPLETE ANTI-FEDERALIST ¶¶ 2.9.147-2.9.148 (Brutus).

[458] U.S. CONST. art. I, § 5, cl. 2.

rules of legislative procedure than did the federal constitution. The most significant requirement beyond the type of general federal rules was the requirement that a bill had to be read in each house on three successive days, unless four-fifths of the house voted to dispense with the reading.[459] No greater procedural rules appeared in the 1832 or 1869 constitutions.[460] Thus only the 1890, post-Reconstruction constitution created the detailed rules for action by the legislature.

What appears to be a cogent explanation of the role of the judiciary in reviewing compliance with constitutional procedural rules by the legislature comes from *Wren*:

> The legislature is one of the three co-ordinate and co-equal departments into which the powers of government are divided by the constitution, possessing all legislative power and not subject to supervision and control during its performance of its constitutional functions, nor to judicial revision afterward of the manner in which it obeyed the constitution its members are sworn to support. . . . That instrument contains many provisions as to the passage of bills which are admitted to be addressed to legislators exclusively, and for non-observance of which there is confessedly no remedy which courts can apply . . . . Let the courts accept as statutes, duly enacted, such bills as are delivered by the legislature as their acts authenticated as such in the prescribed mode.[461]

After referring to such considerations, the *Blackmon* court nonetheless stated that only if the legislature performs its function to comply with its own rules "in a manifestly wrong manner which does critical harm to the legislative process is judicial intervention justified."[462] That manifest error review applies regardless of whether the allegedly breached rule is in the constitution or only in a rule adopted by the legislative body itself.[463] This suggests constant though respectful over-

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[459] MISS. CONST. art. III, § 23 (1817).

[460] MISS. CONST. art. III, § 23 (1832); MISS. CONST. art. IV, § 23 (1869).

[461] Ex Parte *Wren*, 63 Miss. 512, 533-34 (1886).

[462] Tuck v. Blackmon, 2000-CA-00759-SCT § 8, 798 So. 2d 402, 407 (Miss. 2001).

[463] *Blackmon*, ¶ 8, 798 So. 2d at 407.

sight by the judiciary of conformity to legislative rules. Whether *Blackmon* was a sea change or only a slight shift in the tides remains for future cases to reveal.

IV. Can the Judge Be a Soldier? A Private Litigant Seeks Judicial Separation

The questions of "what is the state flag" and "who can decide what is a bill" have been resolved. What is still in litigation is one of the most explicit, though narrow, questions about separation of powers ever brought in a Mississippi court. At its simplest, the suit asks "what exactly is the militia?" The direct separation of power question, though, is whether someone serving as a justice of the supreme court is also serving in the executive branch when he puts on his uniform as a brigadier general in the Mississippi National Guard. What this suit may resolve are quite specific issues of the meaning of holding an office in more than one department of government. It may also answer whether every part of state government is necessarily in one of the three branches.[464]

William L. Waller, Jr. is the namesake son of the man who served as Mississippi's governor from 1972-1976. The younger Bill Waller followed his illustrious father with what is an equally impressive career, in law, politics and in the military. Since the timing of different parts of the career may be important to the constitutional issues, the following chronology should be noted:[465]

1974	Commissioned a Second Lieutenant, United States Army Reserves
1975	Commissioned a Second Lieutenant, Mississippi National Guard

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[464] In the interest of proper evaluation of the analysis that follows, be assured that I have made every effort to be objective. However, I am also a member of the Mississippi National Guard, though at a much lower rank than General Waller, and a member of the Mississippi judiciary, also at a much lower rank than Justice Waller. In 1996, I was one of the candidates that Bill Waller, Jr. overwhelmed in his election to the supreme court.

[465] These dates are from attachments to the complaint in *Doe v. Waller*, No. G2002-204 W/4 (Hinds County Ch. Ct. Feb. 7, 2002).

1977	Commissioned a First Lieutenant, Mississippi National Guard
1977	Admitted to the Mississippi Bar; in private practice until 1998
1981	Commissioned a Captain, Mississippi National Guard
1987	Commissioned a Major, Mississippi National Guard
1992	Commissioned a Lieutenant Colonel, Mississippi National Guard
1995	Appointed Municipal Judge, Jackson, resigned 1996
1996	Elected to Mississippi Supreme Court (November)
1998	Commenced service on Supreme Court (January)
1998	Commissioned a Colonel, Mississippi National Guard (May)
2000	Commissioned a Brigadier General, Mississippi National Guard

In February 2002, "Wonda Doe" brought suit against Justice/General Waller. Doe, in her complaint, described herself as "an adult, taxpaying citizen of Mississippi . . . [who] currently has a case on appeal before the Supreme Court of Mississippi."[466] Doe asserted that she was the plaintiff in a case then pending in Hinds County Circuit Court, styled *Doe v. Stegall.*[467] The Hinds County Circuit Court granted the defendants' motion for summary judgment, and the case was appealed to the supreme court. In an opinion written by Justice Waller, the supreme court reversed and remanded the trial court's grant of summary judgment on the basis that a dispute of material fact existed.[468] On September 25, 2001, the circuit court again granted summary judgment to the defendants and

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[466] *Id.* Complaint for Declaratory and Equitable Relief, dated February 7, 2002, filed February 8, 2002. Perhaps unimportant to the legal issues, but the attachments to the complaint indicated that the litigation was something of a present for Justice Waller, who turned fifty years old on February 9, the day after the suit was filed.

[467] *Id.* (referring to Civil Action No. 251-94-410 CIV).

[468] *Doe v. Stegall*, 1998-CA-01058-SCT, ¶ 16, 757 So. 2d 201, 206 (Miss. 2000).

Doe appealed.[469]

It has been said by some commentators that the basis for the suit against this judge is not one of Wonda Doe's abstract interest in the constitution's separation of power requirements. Such zeal solely in the name of good government would be commendable. Nor is it necessarily an effort to assure that no one infected by cross-branch influences decide her case. Another possible consideration was raised by a newspaper columnist:

> "Doe" is represented in the case by well-known Jackson trial lawyer Shane Langston—who just happens to be the son-in-law of another justice on the state's highest court [Chuck McRae] . . . .
>
> It's clear that the Waller lawsuit is nothing more or less than the latest salvo in what has become a war for control of the state Supreme Court between trial lawyers and the business and professional community.
>
> If the suit against Waller is successful, Gov. Ronnie Musgrove—the poster boy for trial lawyer campaign contributions—will appoint his successor. That's the fact that strikes fear in the hearts of the state's business community.[470]

The columnist's reference to Shane Langston's December 2001 marriage to Justice McRae's daughter may indicate why Justice McRae recused himself from two cases in which Langston was involved and might feel required to continue doing so.[471] Langston was president of the Mississippi Trial Lawyers' Association in 2001-2002.[472] Whether there are predictable divisions on the supreme court, which justices could be thought to favor one side or the other in the ongoing tort wars and which cannot fairly be found to be applying predisposi-

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[469] *Waller*, No. G2002-204 W/4, Complaint ¶ 1.

[470] Sid Salter, *Waller Suit New Salvo in War for the Court*, CLARION-LEDGER (Jackson, Miss.), Mar. 31, 2002, at 1G.

[471] Rawson v. Jones, 1999-CA-00257-SCT, ¶ 13, 816 So. 2d 367, 371 (Miss. 2001); Williams v. Bell, 1999-IA-00045-SCT, ¶ 24, 793 So. 2d 609 (Miss. 2001).

[472] Dennis Camire & Jerry Mitchell, *U.S. Chamber Targets Miss.*, CLARION-LEDGER (Jackson, Miss.), May 9, 2002, at 1A. Langston was also the NAACP's attorney in *Confederate Veterans v. NAACP*, 96-CA-01167-SCT, 774 So. 2d 388, 388 (Miss. 2000). Assistant Attorney General T. Hunt Cole has been the attorney for the state in all three principal suits discussed in this article.

tions, are beyond the proprieties of this article. Therefore, whether a removal of Justice Waller from the court would benefit members of the Trial Lawyers' Association is for others to analyze. Justice McRae's possible obligation to remove himself from cases will become academic as he was defeated in the November 2002 election.[473]

It is arguable that the seven senator plaintiffs in *Blackmon* and Wonda Doe in the *Waller* suit are similar in the following manner. Each was asserting an issue—assuring that a bill is read aloud in its entirety, and that a justice is removed when he becomes a general, respectively—merely to provide a vehicle to reach other goals. That is not an especially unusual use of litigation, but it is distinguishable from some separation of powers lawsuits in which ending aggrandizement or encroachment was not just the vehicle but was arguably the primary goal.[474]

Doe's litigation asserts as its grounds the two initial sections on separation of powers. It also claims that Section 266 is being violated. This concept has appeared in some form in all four Mississippi constitutions. The present language is this:

> No person holding or exercising the rights or powers of any office of honor or profit, either in his own right or as a deputy, or while otherwise acting for or in the name or by the authority of another, under any foreign government, or under the government of the United States, shall hold or exercise in any way the rights and powers of any office of honor or profit under the laws or authority of this state, except notaries, commissioners of deeds, and United States commissioners.[475]

Doe argues that Section 266 prohibits Justice Waller from serving on the court while he is serving in what she calls an office of honor or profit under the government of the United

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[473] Ben Bryant, *Dickinson Wins Big for Seat on High Court*, SUN HERALD (Biloxi, Miss.), Nov. 6, 2002, at 1.

[474] *E.g.*, Alexander v. State *ex rel.* Allain, 441 So. 2d 1329 (Miss. 1983) (noting that the attorney general sought to remove legislators from executive branch boards; there may always be mixed motives, though, as Attorney General Allain's successful race for governor in 1983 likely was aided by the favorable publicity from the suit).

[475] MISS. CONST. art. XIV, § 266.

States.[476] Section 266 goes beyond the terms of the separation of powers provisions that are being examined through these three suits.

A defense motion for the chancellor to recuse herself because her daughter was employed at the plaintiff's law firm was granted.[477] As this is written, a defense motion for summary judgment is pending. Regardless of how and when a final judgment is reached in the chancery court, an appeal is a possibility. Further review of the issues raised by this case should await the end of the litigation.

V. Recurrence of Separation Issues

These suits are far from the only ones in which significant struggles occurred among the branches of government. A brief review of other struggles will give context to the most recent disputes.

The boldest of the declarations by the judiciary occurred in 1981 when the supreme court assumed the authority to write rules of procedure for the internal operations of the courts.[478] The power asserted goes further than that exercised by the United States Supreme Court, which relies on Congress to approve the final rules even though they are initiated by the Court.[479] The rules over which the judiciary asserted authority are those for the "internal" operations of the courts; that can be difficult to define, but until recently the court has recognized that statutes of limitations, the right to appeal, and time periods to appeal were matters for the legislative branch.[480]

Similar and high-stakes separation of powers issues will be

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[476] Doe v. Waller, No. G2002-204 W/4 (Hinds County Ch. Ct. Feb. 7, 2002).

[477] *See* Sid Salter, *Waller Suit New Salvo in War for the Court*, CLARION-LEDGER (Jackson, Miss.), March 31, 2002, at G1.

[478] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975). The rules were promulgated on May 26, 1981, under the inherent authority vested in the court. Order of May 26, 1981, *printed in* MISS. COURT R. 4.

[479] 28 U.S.C.S. §§ 2072-74 (1992).

[480] Wolfe v. City of D'Iberville, 799 So. 2d 142, 149 (Miss. Ct. App. 2001) (Southwick, P.J., concurring) (stating that separation of powers still leaves authority in legislature for policy level rule choices involving courts such as establishing the time within which to appeal from trial court).

the constitutionality of tort reform legislation adopted at a lengthy 2002 special session. Among other provisions are a cap on noneconomic damages in medical malpractice cases, limits on punitive damages in all cases, and revisions to the supreme court's pronouncements on hedonic damages.[481]

Legislative control over other branches' budgets was one of the separation of powers defects that Thomas Jefferson saw,[482] but that control has been a constant in Mississippi. The supreme court during recent state budget problems has rejected gubernatorial directives that it comply with an assigned percentage reduction in its budget. The court found that the orders are beyond the governor's authority just as would be his ordering the legislature to conduct a specific reduction; instead, the court stated that reductions consistent with the judiciary's analysis of the appropriate response would be made.[483] The legislative branch itself certainly has the right to set judicial budget levels and to adjust them if anticipated revenues fall. It may be able to delegate that authority to the executive. However, there is a basis to argue that a minimal operating level of funding is constitutionally required. The United States Supreme Court stated that "it is necessary to resolve those competing interests [of separation of powers] in a manner that preserves the essential functions of each branch."[484] The legislature has the power of the purse, but if the purse strings are pulled so tightly as to obstruct the receipt of minimally essential funds, that might violate the constitution by preventing a coequal branch from operating. However, economic laws are written by forces beyond those that control

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[481] 2002 Miss. Laws 3d Spec. Sess., chs. 2, 4.

[482] JEFFERSON, *supra* note 339, at 245 (other branches must rely on the legislative branch for "their subsistence in office").

[483] *E.g.*, Letter from Edwin Pittman, Chief Justice, Mississippi Supreme Court, to Gary Anderson, Executive Director, Department of Finance and Administration (Feb. 20, 2002) (copy on file with author).

[484] United States v. Nixon, 418 U.S. 683, 707 (1974) (discussing the balance that must be struck between executive privilege and judiciary's need for evidence in criminal prosecutions). A related argument is that Congress cannot limit the jurisdiction of federal courts in a way that impedes the judiciary's "essential function." Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953).

constitutions and statutes. If an economic downturn causes tax revenues to fall appreciably short, every branch could see its essential functions curtailed.

The legislature sought to reimpose sovereign immunity after the supreme court held that the doctrine was obsolete under its new understanding of the 1890 constitution. This dispute ran through various court decisions, followed by new legislative enactments, for a decade after the 1982 decision in *Pruett v. City of Rosedale*.[485] The court declared that the legislature violated separation of powers when it reinstated sovereign immunity after the court voided it.[486]

Governors have not always wanted to accede to the senate's refusal to confirm a nominee to office. Governor Kirk Fordice appointed Mike P. Marsh to be chairman of the Workers' Compensation Commission. No vote was ever taken in committee despite two re-submissions, including one at a special legislative session called to consider the appointment. Nonetheless, the appointee continued to serve on an acting basis until the new governor, Ronnie Musgrove, assumed office.[487]

Governor Ronnie Musgrove then became involved in the same gubernatorial tug and senate pull. He appointed Brigadier General George S. Walker in February 2000 to be the Adjutant General. In May, the Senate Veterans and Military Affairs Committee, by a four to three vote, tabled the nomination. The session ended with no further action being taken. One week later, the governor named General Walker as the senior Assistant Adjutant General and his Special Advisor on Military Affairs, thereby to perform the functions of The Adjutant General. An Attorney General's opinion declared that as a matter of statutory construction the governor could not make this appointment of an assistant adjutant general until there was

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[485] 421 So. 2d 1046 (Miss. 1982).

[486] Presley v. Mississippi State Highway Comm'n, 608 So. 2d 1288, 1294 (Miss. 1992).

[487] MISS. SEN. J. 30-31 (2000) (noting that nomination was returned to governor on January 12, 2000); Gina Holland, *Fordice to Give Marsh One Last Push for Appointment*, COMMERCIAL-APPEAL (Memphis, Tenn.), Dec. 29, 1999, at A14.

an adjutant general to make a recommendation.[488] General Walker resigned his position, thereby mooting any constitutional issue.[489]

Attorney General Mike Moore's suit against cigarette manufacturers gave courts what had previously been legislative matters of regulating and taxing tobacco products. "The tobacco litigation and subsequent settlement was the beginning of a revolutionary change in the manner in which public health is regulated in this country. State governments across the nation used the judicial branch in an attempt to achieve widespread reforms in the manufacture, marketing, and regulation of tobacco."[490] Novel theories of liability were used; contracts were entered with private attorneys to bring the suits; settlements were reached prior to judicial determinations of the legal merits of the claims.[491] "If the fallout from the state tobacco litigation is not addressed quickly, it will further distort and destabilize a number of areas of law, including the separation of powers within state governments," at least in the view of one academician.[492] Subsequent litigation by governmental bodies against gun manufacturers has been much less successful.[493] The fat war has now been commenced against Big Food by

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[488] Employment of Assistant Adjutant General, Op. Miss. Att'y Gen. (July 5, 2000) (referring to MISS. CODE ANN. §§ 33-3-9 (2000)).

[489] Joseph Ammerman, *Guard's Walker Resigns*, CLARION-LEDGER (Jackson, Miss.), July 4, 2000, at 1A.

[490] Eric Womack, *A Revolution in Local Government Law: Recognizing the Home Rule Implications of Municipality Suits Against Gun Manufacturers*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 255, 255 (2001-2002).

[491] *In re* Fordice, 691 So. 2d 429, 434-35 (Miss. 1997). This is the only appellate decision in the case. The governor's challenge to the attorney general's right to file the suit did not raise a sufficient issue to grant discretionary and extraordinary relief. *In re* Fordice, 691 So. 2d at 434-35. The right existed to renew the issue on a direct appeal on the merits, but that was later foreclosed by settlement. *Id.* A detailed review of this litigation is found in MICHAEL OREY, ASSUMING THE RISK: THE MAVERICKS, THE LAWYERS, AND THE WHISTLEBLOWERS WHO BEAT BIG TOBACCO (1999).

[492] Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 565 (2001).

[493] Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond–A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1372-78 (2001).

ravenous attorneys.[494] Regulation and taxation by litigation instead of legislation is part of the new legal landscape.

CONCLUSION

The lines separating the three branches are imprecise. The examples given here suggest the complexity, volatility and significance of many of the separation of powers disputes that arise. The constitution creates the separation, but enforcement of the rules was left to the branches themselves. Brute physical force is not often in play, but political considerations frequently are decisive. Usually in such inter-branch disputes, the initial final word is from the court system. The budgetary or statutory final word is from the legislature. The final memorable word is often from the branch that has the best access to a statewide pulpit, the executive.

The "hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power" can take many forms.[495] The supreme court in the flag case decided an issue not raised, fully resolving the appeal on a different basis. Once reaching the issue, the analysis was significantly incomplete even if the doubts raised here could ultimately be decided in a manner consistent with the court's opinion. It can be debated whether this was a ruling based on an unstated belief that the flag design had, in the Calabresian sense, become obsolete or even odious, but there are indications that hydraulic pressures of some sort were in operation.

A chancellor's issuance of an injunction requiring a specific interpretation of internal operational rules for the legislature, at least when those rules are established in the constitution, failed to apply established precedents. The supreme court partially repaired the breach in the inter-branch boundary. The court also announced, though, that it remained available to correct all serious procedural errors.[496] The opening for judicial interpretation has been enlarged.

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[494] Jonah Goldberg, *The Anti-Big Mac Attack,* NATIONAL REV., July 15, 2002, at 27-28.

[495] INS v. Chadha, 462 U.S. 919, 951 (1983).

[496] *Blackmon*, 798 So. 2d at 402.

Finally, the outcome remains uncertain in the effort by a litigant to gain the advantage of a perceived violation of separation of powers by a supreme court justice who happens to be a general. If it is first determined that militia service places a soldier within the executive branch, and next that a general is an "officer" in that department, the litigation will then test whether separation of powers principles will be based more on Jeffersonian words, which tend to be absolutist, or on constitutional compromises, which enshrine many exceptions.

The courts can involve themselves too readily in another branch's internal operations. Even so, in the "absence of structural mechanisms to require these officials to undertake this principled task [of complying with constitutional boundaries], and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role."[497]

What has been reviewed here is close to two hundred years of Mississippi constitutional history. However, doubt may exist of whether the past understanding of the constitution controls the present. The supreme court has held that our state constitution is a "living document," but that it remains fixed by the original purpose.[498] The somewhat contradictory analysis is this:

> 1st. The Constitution is a living document for the operation and perpetuation of our government.
>
> 2nd. It should not be changed, expanded or extended beyond its settled intent and meaning by any court to meet daily changes in the mores, manners, habits, or thinking of the people. The power to alter is the power to erase. Such changes should be made by those authorized so to do by the instrument itself—the people. When a portion of the Constitution has been construed, considered and acted upon for decades in one way by all branches of government, both federal and state, such meaning should, in the interest of all concerned, not be changed except by amendment.[499]

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[497] United States v. Lopez, 514 U.S. 549, 568, 578 (1995) (Kennedy, J., concurring).

[498] *State v. Hall*, 187 So. 2d 861, 863 (Miss. 1966).

[499] *Hall*, 187 So. 2d at 863.

Constitutional "growth" is a controversial topic. Some of the debate is over symbols. Is the constitution "living" or is it "dead"? From the opposite viewpoint, is the constitution a reliable anchor to the law, or is it instead just an impressive sail capable of taking a judicial majority wherever it wants to go? For that matter, does "growth" mean the gradual maturity and blossoming of a magnolia tree or the precipitous spread and destruction of kudzu?

Staying close to the original understanding of separation of powers may be especially important since these structural and functional limits on power are so fundamental. What causes efforts to change the boundaries between the branches to be both probable and troublesome, is that the makers of statutes, constitutional interpretations, and administrative rules are the ones who can benefit themselves by the changes. Without stationary boundary markers set by the constitution and recognized by the courts, the power to alter becomes the power to erase.

MISSISSIPPI INFORMED CONSENT LAW: A SURVEY OF DECISIONS RESPONDING TO RECENT SCIENTIFIC RESEARCH ON TESTS FOR INTOXICATION

Jim Fraiser[*]

I. INTRODUCTION

This article will examine the current status of Mississippi law concerning cases decided under the purview of Mississippi Implied Consent Law,[1] and similar statutes from other states, emphasizing decisions in response to the latest pronouncements of the scientific community regarding the adequacy of breath testing devices such as the Intoxilizer 5000. This summary includes decisions by the Mississippi Supreme Court and the Mississippi Court of Appeals, Mississippi's federal courts, as well as decisions published in other state and federal jurisdictions interpreting implied consent statutes and responding to scientific pronouncements offered as evidence in the trial of D.U.I. cases, which may be helpful in determining which interpretive direction our courts will take when considering such matters.

II. JUDICIAL HISTORY CONCERNING SCIENTIFIC, CONSTITUTIONAL AND PROCEDURAL ASPECTS OF MISSISSIPPI IMPLIED CONSENT LAW

When, in 1991, the Mississippi Supreme Court concluded that defendants accused of driving under the influence[2] could

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[1] MISS. CODE ANN. § 63-11-1 to -53 (Supp. 2002).

[2] Fisher v. City of Eupora, 587 So. 2d 878, 886-88 (Miss. 1991). The court

offer expert testimony as to their 2100 to 1 breath-to-blood conversion ratio[3] in rebuttal of breath test result evidence of intoxication, the court was following the example set by courts in other jurisdictions which were themselves responding to the latest scientific pronouncements[4] on the validity and accuracy of intoxication testing by field tests and intoxilizer machines.[5] The court subsequently decided other cases involving these issues, including *Fulton v. City of Starkville*[6] and *Richbourg v. State*,[7] in which it considered the accuracy and reliability of the intoxilizer breath test[8] and horizontal gaze nystagmus (HGN) test,[9] respectively.

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cited MISS. CODE ANN. § 63-11-30 (Supp. 1988) and held that the statute defines "operating under the influence, makes said act a crime, and established the penalties therefore." *Fisher*, 587 So. 2d at 887. In the *Fisher* case, the legal blood alcohol content (BAC) under the statute limit was .10%. *Id.* at 881. The newest statutory provision has lowered the legal limit to .08%. MISS. CODE ANN. § 63-11-30 (Supp. 2002). Subsection 1(a) concerns driving under the influence, while subsection (c) constitutes the separate "per se" charge invoked by a BAC of .08% or more. MISS. CODE ANN. § 63-11-30(1)(a), (c) (Supp. 2002).

[3] *Fisher*, 587 So. 2d at 886-88 (Miss. 1991) (citing State v. Brayman, 751 P.2d 294, 297 (1988)).

[4] *See, e.g.*, Michael P. Hlastala, *The Alcohol Breath Test: A Review*, 84 J. APPLIED PHYSIOLOGY 401 (Jan. 1998) (indicating that modern day breath testing is based upon an outdated understanding of pulmonary physiology).

[5] *See, e.g.*, State v. Brayman, 751 P.2d 294, 297 (Wash. 1988); Desmond v. Super. Ct. of Maricopa County, 779 P.2d 1261, 1266 (Ariz. 1989) (citing a study performed by chemist and toxicologist, Dr. Kurt Dubowski, in support of its ruling that an intoxilyzer reading of .151% was insufficient to prove the defendant's intoxication on a statutory "per se" charge of BAC over .10%). Dr. Kurt Dubowski was on the faculty of the University of Oklahoma at the time of the study. Kurt Dubowski, Ph.D., *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, Supp. No. 10, J. STUD. ALCOHOL 98 (July 1985).

[6] 645 So. 2d 910 (Miss. 1994).

[7] 744 So. 2d 352 (Miss. 1999).

[8] *Fulton*, 645 So. 2d at 914 (citing the case of *State of Arizona v. Velasco*, 799 P.2d 821, 826 (Ariz. 1990) in considering the factors that could affect the Intoxilyzer 5000, such as "random error, radio frequency interference, mouth alcohol, chemical interference, insufficient alveolar samples, and operator error").

[9] *Richbourg*, 744 So. 2d at 354 (citing *Young v. City of Brookhaven*, 693 So. 2d 1355, 1360-61 (Miss. 1997) for the proposition that the HGN test was not "generally accepted within the scientific community" and that results of the test could not be introduced at trial to show the degree of an accused's intoxication). *Accord*, *Rhoades v. State*, No. 2001-KM-00130-COA, 2002 WL 982616 at *3 (Miss. Ct. App. May 14, 2002) (upholding a D.U.I. conviction, and affirming a lower court's decision to allow the introduction of evidence of the fact that an HGN test

Science-related D.U.I. issues are one of three classes of issues which have generated the most appellate attention in Mississippi. The other two are those concerning breath testing procedure and the constitutionality of various law enforcement procedures vis-a-vis drunk drivers.

Significant procedural issues have included the requirement of a fifteen minute observation period[10] prior to administering a breath test, the question of bifurcation of D.U.I. trials into guilt and sentencing phases,[11] the grounds for reduction of D.U.I charges, e.g., from a second offense to a first offense,[12] and the definition of the procedure for offering proof of the certification of the accuracy of the breath testing machine, which is part of the foundation for introducing evidence of an incriminating breath test result.[13] Of these, the

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was given to determine probable cause to arrest, since the lower court did not allow introduction of the HGN test results, which would have been error).

[10] *See Fisher*, 587 So. 2d at 881-82 (Miss. 1991) (holding that the statutory requirement in MISS. CODE ANN. § 21 63-11-5 that a breath test operator observe the defendant for fifteen minutes prior to offering a breath test, to rule out "regurgitation or consumption of any substance by mouth," was mandatory. *Accord*, Briggs v. State, 741 So. 2d 986, 990 (Miss. Ct. App. 1999) (15 minute observation period mandatory); United States v. Plumer, 920 F. Supp. 151, 152 (D. Kan. 1996) (tobacco in driver's mouth obviates accuracy of test results where officers failed to check for foreign substances in his mouth during observation period and prior to conducting a breath test).

[11] *See* Strickland v. State, 784 So. 2d 957, 962 (Miss. 2001), a 5-4 decision wherein the court declared that a jury should not be advised of a D.U.I. defendant's previous convictions in the guilt phase of the trial, but that such evidence should only be introduced in the sentencing phase. *But see* Rigby v. State, 2002 WL 1584307 at *5 (Miss. July 18, 2002), a decision in which another divided court declared that previous D.U.I. convictions may be introduced to a jury in a case where previous misdemeanor convictions are elements of an enhanced D.U.I. felony charge, and that there can be no bifurcation of guilt and sentencing phases in a felony D.U.I. trial.

[12] *See* Ostrander v. State, 803 So. 2d 1171, 1176 (Miss. 2002) (trial court allowed to reduce D.U.I. second offense to first offense after it had directed a verdict for the defendant on second offense charge, despite a statutory prohibition (MISS. CODE ANN. § 63-11-39) against reducing D.U.I. offenses to non-D.U.I. offenses, since the court had already determined that the accused was guilty of the offense of driving while intoxicated, and the reduction was solely for the purpose of sentencing in accordance with the penalty statute, MISS. CODE ANN. § 60-11-30 (2)(b).

[13] *See* Meeks v. State, 800 So. 2d 1281, 1282-83 (Miss. Ct. App. 2001). Before the prosecution may introduce evidence of breath test results, it must first dem-

certification issue has been the one most highly scrutinized by the Mississippi Supreme Court, resulting in a long line of decisions beginning with *Johnston v. State*,[14] where the methods by which the state could introduce the required proof of calibration of an intoxilizer machine were first considered.[15] Furthermore, in the recent decision of *Meeks v. State*,[16] the court held that the only approved methods of introducing proof of certification of calibration of breath testing machines were (1) the direct testimony of a qualified calibrating officer, and (2) the introduction of a certified copy of certificate of calibration by the custodian of the calibration records, consistent with M.R.E. 902, the "business records" exception to the hearsay rule.[17]

Significant constitutional issues involving D.U.I. prosecutions have included the right to *Miranda* warnings during a D.U.I. stop,[18] the constitutionality of roadblocks,[19] the right

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onstrate that the test was performed by one qualified to do so on a machine tested for accuracy at specified intervals. *Meeks*, 800 So. 2d at 282. The test for breathalyzer machine accuracy is the calibration, and the acceptable proof of that test is the issue considered by our courts. Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990).

[14] 567 So. 2d 237 (Miss. 1990).

[15] *Johnston*, 567 So. 2d at 238 (interpreting MISS. CODE ANN. § 63-11-19 (1972) to mean that breath tests are valid only when performed on a machine certified to be accurate).

[16] 800 So. 2d 1281 (Miss. Ct. App. 2001) (deciding that the failure of the State to introduce a certified copy of certification of calibration of the intoxilizer machine required reversal of the defendant's conviction); *accord* Jones v. State, 798 So. 2d 592, 594-95 (Miss. 2001) (holding that unattested copies of a certificate of calibration of an intoxilizer were insufficient to authenticate that document and requiring reversal of a defendant's D.U.I. conviction based upon a breath test result); *see also* Callahan v. State, 811 So. 2d 420, 422 (Miss. Ct. App. 2001) (municipal court clerk held to be the proper official to certify calibration certificates for intoxilyzers in trials held in municipal court, since municipal clerks have a statutory duty to maintain those records (as per MISS. CODE ANN. § 21-15-19).

[17] *Meeks*, 800 So. 2d at 1283.

[18] *See* Pennsylvania v. Muniz, 496 U.S. 582, 593-99 (1990) for the proposition that *Miranda* warnings are not required during a roadside stop and non-custodial, pre-arrest, preliminary inquiry as to a driver's drinking status. However, the *Muniz* court held that a D.U.I. defendant's statement, given during a post-testing booking procedure, that he didn't know the date of his sixth birthday, could not be used against him in the absence of previously rendered *Miranda* warnings. *Muniz*, 496 U.S. at 600; *see also* Shephard v. Miss. State Highway Patrol, 693 So. 2d 1326, 1330 (Miss. 1997) (refusing to adopt the "confusion doctrine," ruling that

to communicate with others after a D.U.I. arrest,[20] and prosecutorial utilization of previous uncounseled misdemeanor D.U.I. convictions for enhancement of a subsequent D.U.I. conviction to a felony.[21] The enhancement issue has received the most judicial attention, with our Mississippi appellate courts concluding that the state may only enhance punishment with prior D.U.I. convictions had within the past five years,[22] and only with those convictions where the defendant was afforded counsel or an opportunity to intelligently waive counsel at the time he pled guilty to the previous offenses being used for enhancement purposes.[23]

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a driver's alleged confusion as to whether *Miranda* applied to breath testing procedures did not preclude the trial court from finding that he refused the breath test).

[19] *See* Michigan State Police v Sitz, 496 U.S. 444, 447 (1990) (constitutionality of D.U.I. roadblocks upheld); Briggs v. State, 741 So. 2d 986, 989 (Miss. Ct. App. 1999) (upholding constitutionality of license-check roadblock that led to a D.U.I. arrest where the correct procedures were followed). *But see* State v. DeBooy, 996 P.2d 546, 551-52 (Utah 2000) (ruling that a D.U.I. roadblock unconstitutional because the police did not have a roadblock plan that sufficiently provided guidelines as to what the search should entail and how it should be conducted, and also because the plan (and search) did not limit the delay of and intrusion upon motorists, who were subjected to lengthy searches for D.U.I., seatbelt, child restraint, driver's license and insurance certificate violations).

[20] *See* United States v. Canane, 622 F.Supp. 279, 282 (D. N.C. 1985) (holding failure of jailers to allow D.U.I. arrestee to communicate by phone with his father so his father might observe him for signs of intoxication or the lack thereof violative of his due process right to post-arrest communication; *see also* Scarborough v. Kellum, 386 F. Supp. 1360, 1363-64 (N.D. Miss. 1975) (holding D.U.I. arrestee's repeated demands for an objective test of his blood alcohol content placed a constitutional obligation upon his jailers, consistent with jailhouse security arrangements, to provide him with a meaningful opportunity to communicate with the outside world). *But see* Case v. State, 817 So. 2d 605, 608 (Miss. Ct. App. 2002) (finding that a defendant's due process right to communication and medical examination were not denied since he was allowed one phone call, and he had no absolute right to a state-paid medical examination for alcohol levels in his blood).

[21] *See, e.g.*, Ghoston v. State, 645 So. 2d 936, 939 (upholding admission of prior convictions at a sentencing hearing).

[22] *See* Porter v. State, 749 So. 2d 250, 254 (Miss. 1999) (citing MISS. CODE ANN. § 63-11-30(2)(b) and holding that enhancement may only be based upon convictions obtained no earlier than five years before the current charge was brought); *see also* Mason v. State, 799 So. 2d 884, 885 (Miss. 2001) (holding that only properly certified abstracts of judgment or orders of conviction will serve as bases for enhancement of D.U.I. penalties).

[23] *See* Conn v. State, 744 So. 2d 346, 348 (Miss. Ct. App. 1999) (holding prior

However, the relatively recent flurry of activity by the scientific community with regard to the potential inaccuracy of intoxication-testing machines and procedures has resulted in another hotly contested batch of D.U.I. cases in Mississippi's courts.

III. D.U.I.: SCIENCE AND THE LAW

A. Problems with Field Tests

A key tool in determining whether a suspect was driving while intoxicated is the roadside field sobriety test. Field tests are searches, and hence, allowable only where there is probable cause that an individual has driven under the influence, or when he or she consents to the test.[24] The field test also plays a key role in providing sufficient probable cause to give breath tests, since many courts have decided that other indicia of intoxication, such as odor of alcohol on the driver's person or breath, an admission of drinking, and/or involvement in an automobile accident are insufficient bases for offering the breath test to a suspect.[25]

D.U.I. convictions in which defendant lacked counsel may not be used to enhance D.U.I. punishment unless the defendant signed a valid waiver of counsel, although the waiver need not contain information regarding enhancement of future D.U.I. charges). The United States Supreme Court weighed in on these enhancement issues in 1994. *Nichols*, 511 U.S. at 748-49. In *Nichols*, the Court held that the consideration of past misdemeanor convictions in enhancing punishment does not violate the Sixth and Fourteenth Amendments of the Constitution so long as the defendant did not serve time in prison for the previous convictions. *Nichols*, 511 U.S. at 748-49. The *Nichols* decision cleared up confusion among state supreme courts which had resulted after the Court issued *Baldasar v. Ilinois*, 446 U.S. 222 (1980), a decision in which a plurality of the Court stated that such a consideration was in violation of the Constitution. *See, e.g.*, State v. Vares, 801 P.2d 555, 558 (Haw. 1990) (following the *Baldasar* opinion, but subsequently overturned by *Nichols*); State v. Olson, 544 N.W.2d 144, 146-47 (N.D. 1996).

[24] United States v. Hopp, 943 F. Supp. 1313, 1315 (D. Colo. 1996).

[25] *See, e.g.*, Richbourg v. State, 744 So. 2d 352, 357 (Miss. 1999) (holding that evidence that defendant had wrecked his car, had beer cans in his trunk, had odor of alcohol on his person, and refused the breath test, was insufficient to convict him for driving under the influence); *see also* Clay v. State, 387 S.E.2d 644, 646 (Ga. Ct. App. 1989) (holding red glassy eyes and odor of alcohol on breath were insufficient to warrant breath test where no field test had been offered); People v. Lukach, 635 N.E.2d 1053, 1069 (Ill. App. Ct. 1994) (holding that driver's admission of drinking and the fact that his car went off the road, without

Field tests frequently utilized in Mississippi include finger to nose, picking up coins, reciting the alphabet, touching fingers together while counting, horizontal gaze nystagmus (HGN), walk and turn, one-leg stand, and the portable breath test (PBT).[26] However, the only three tests approved by the United States Department of Transportation as sufficiently standardized to offer reliability in roadside testing for intoxication are the HGN, one-leg stand, and walk and turn tests.[27]

Nevertheless, even when performed in accordance with approved national standards, these three tests, and the handheld portable breath test, which checks for the presence of alcohol in the subject's breath, are all subject to their share of flaws. For example, according to the U.S. Department of Transportation (D.O.T.), the HGN is problematic because nystagmus occurs naturally in some people and may occur in others because of certain medications, because officers often fail to select a forty-five degree angle for the ground upon which the driver must perform the test, and because an officer's determination of a driver's ability to follow an object with his or her eyes is purely subjective.[28]

A 1977 study commissioned by the U.S. D.O.T. found that slightly less than half of the tested subjects who failed the three "standardized" field tests–the HGN, one-leg stand, and walk-and-turn test–were not legally under the influence of alcohol, having blood alcohol concentrations (BAC) of less than .10%.[29] A subsequent test by the same group revealed that at

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other incriminating evidence such as failed field tests, did not constitute probable cause to warrant offering the accused a breath test for intoxication).

[26] *See* ROBERT P. CHAMBERLIN & CLAUDE PURVIS, DUI PROSECUTION AND DEFENSE IN MISSISSIPPI, §§ 5.2-5.7 (1995).

[27] *Id.* at 36 (citing *Improved Field Sobriety Testing,* DOT HS 806512, National Highway Safety Administration (1984)). In September 2000, John Tarantino, executive editor of *DWI Journal: Law and Science,* declared in a *Lawyers Weekly USA* article that in light of recent studies and court decisions, unstandardized field tests such as the finger to nose, picking up coins, balancing, counting and memory tests should be viewed as "absolutely worthless." Alison B. Bianchi, *Field Sobriety Tests Must Meet Strict Federal Rules*, Sept. 18, 2000, LAW. WKLY. USA.

[28] *Id.* For more information on the HGN and other field tests, see HARVEY M. COHEN, PH.D. & JOSEPH B. GREEN, APPREHENDING AND PROSECUTING THE DRUNK DRIVER: A MANUAL FOR POLICE AND PROSECUTION, § 4.04 (2001) and RICHARD E. ERWIN, DEFENSE OF DRUNK DRIVING CASES, § 10.04 (3d ed. 1997).

[29] LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE, § 4.3.1 (5th ed. 2000) (citing

least one third of the stone cold sober subjects given these three field tests were wrongly presumed by experienced testers to be intoxicated beyond the legal limit.[30]

Two other studies yielded even more chilling results. One, conducted under laboratory conditions, found the walk and turn test to be accurate only 75.1% of the time, with the one-leg stand being accurate 75.5% of the time, and the HGN only slightly more accurate at 81.8%.[31] Also surprising were the results of another test conducted in 1991 at Clemson University, where police officers who were shown videos of sober (.00 BAC) subjects performing six common field tests opined that 46% of the subjects tested were too drunk to drive![32]

Many courts have responded to this body of scientific research by requiring strict standardization of the tests, demanding that officers strictly comply with those standards, and limiting the evidentiary use of such tests at trial. Regarding the HGN test, specifically, the Mississippi courts have declared that the results of such tests may not be used as scientific evidence to prove intoxication at trial.[33] As for the

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V.K. Burns & Herbert Moskowitz, *Psychological Tests for DWI Arrest: Final Report*, DOT-HS-802-424, NHTSA (1977)).

[30] *Id.* (citing Van K. Tharp et al., *Development of Field Test of Psychophysical Tests For DWI Arrests: Final Report*, DOT-HS-805-864 NHTSA (1981)).

[31] TAYLOR, *supra* note 29 (citing Eric Halperin & Robert L. Yolten, *Is the Driver Drunk? Oculomotor Sobriety Testing*, 57 J. AMER. OPTOMETER ASS'N 654 (1986)).

[32] TAYLOR, *supra* note 29 (citing Spurgeon Cole & Ronald Nowaczyk, *Field Sobriety Tests: Are They Designed for Failure?*, 79 PERCEPTUAL & MOTOR SKILLS 99 (1994)).

[33] *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1359-61 (Miss. 1997) (holding that the HGN is a scientific test, but one which has not gained general acceptance within the scientific community); Holmes v. State, 740 So. 2d 952, 960 (Miss. Ct. App. 1999) (holding that prosecution was not allowed to introduce results of HGN test where other indicia of intoxication was slight, and other field tests were not given).

However, other states have allowed the introduction of HGN tests at trial to prove intoxication of drivers. Courts in those states have generally held that the HGN test meets the *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) test for admissibility of expert testimony based on a process using scientific principles generally accepted in the scientific community. However, they only allow the test's introduction for the limited purpose of establishing consumption of alcohol and a potential for impairment, and not to correlate the HGN test results to any breath test (BrAC) score. *See, e.g.,* Ballard v. State, 955 P.2d 931, 940 (Alaska Ct. App.

portable breath test, the Mississippi Supreme Court has stated that the PBT is not calibrated or tested like the intoxilyzer machine, and is only used in determining probable cause, thereby suggesting that it cannot be introduced at trial as evidence of intoxication.[34]

Other courts have issued even stronger statements regarding the potential inaccuracy of sloppily administered field tests. In *State v. Homan*,[35] the Ohio Supreme Court noted that an HGN test was rendered useless when the officer failed to wait four seconds before checking for nystagmus.[36] The *Homan* court also discussed frequent problems with the walk and turn and one-leg stand tests,[37] and declared that "[w]hen field sobriety testing is conducted in a manner that departs from established methods and procedures, the results are *inherently unreliable*."[38] The *Homan* court ruled that for field sobriety tests to serve as an evidentiary basis for probable cause to arrest for D.U.I., "the police must have administered the tests in strict compliance with standardized testing procedures."[39] While the results of scientific studies regarding field

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1998).

Furthermore, in jurisdictions admitting HGN test results as scientific evidence, the results are only admitted after the proper foundation has been laid, i.e., through the testimony of an expert, often the testing police officer, who testifies that he was properly trained to give the test and conducted the HGN test in accordance with his training. *See, e.g.*, State v. Baue, 607 N.W.2d 191, 205 (Neb. 2000).

[34] Williams v. State, 590 So. 2d 1374, 1375 n.1 (Miss. 1991). While several scientific studies have prompted their researchers to declare preliminary breath test devices such as the Alco-Senser inherently inaccurate (*see* V.J. Emerson et al., *The Measurement of Breath Alcohol*, 20 J. FORENSIC SCI. SOC'Y 3 (1980)), at least one court has ruled that if the government's expert testifies that portable breath tests are sufficiently reliable indicia of probable cause to warrant offering an intoxilyzer test, then they are sufficiently reliable to serve as admissible exculpatory evidence for the defense when the defendant passes the PBT test. *See* Patrick v. State, 750 S.W.2d 391, 394 (Ark. 1988).

[35] 732 N.E.2d 952 (Ohio 2000).

[36] *Homan*, 732 N.E.2d at 956.

[37] *Id.* at 955. The court noted, for example, that police officers giving the one-leg stand test often fail to require suspects to keep their foot elevated for a full thirty-seconds during the test. *Id.* at 956.

[38] *Id.* (emphasis added).

[39] *Id.*

tests may be troubling at best, the results of studies concerning court-sanctioned breath-testing devices should give all proponents of intoxilyzers considerable pause before they attest to the accuracy of those machines in court.

B. Problems with Breath Test Machines

1. The Breath to Blood Ratio

The breath alcohol concentration (BrAC) readings obtained on breath analyzing devises such as the Intoxilyzer 5000 (currently in use in Mississippi) are based upon the premise[40] that there is an alcohol concentration ratio of 1:2100 between blood and breath, given the assumption that the alcohol content of the blood is in proportion to the alcohol content of expired breath. In other words, "2.1 liters of deep lung breath contain the same weight of alcohol as 1 cubic centimeter of pulmonary blood."[41]

Unfortunately, this 1:2100 conversion ratio is merely an average, based upon the "average man[;]" human partition ratios may vary from 1:1100 to 1:3000.[42] Consequently, a per-

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[40] The conversion ratio itself is based upon Henry's Law, which recognizes a relationship between the volatile chemical substance in liquid (in this case, blood alcohol) and the same volatile chemical substance in vapor (alcohol in the lungs) at a particular temperature. *See* Peter Gerstenzang, *Breath Issues—Partition Ratio or Blood-Breath Presumption*, THE CHAMPION, Jan./Feb. 1999 *available at* http://www.criminaljustice.org/public.nsf/ChampionArticles/99jan08?OpenDocument (last visited Jan. 27, 2003). The 1:2100 ratio is based upon the fact that the temperature of air leaving an average subject's mouth is 34 degrees centigrade. *Id.*

[41] TAYLOR, *supra* note 29, at 297.

[42] TAYLOR, *supra* note 29, at 298. For more information on partition ratio variance see EDWARD FITZGERALD, INTOXICATION TEST EVIDENCE § 28.1 (2d ed. 1995) (citing Dr. Kurt Dubowski's conclusion that the normal range of partition ratio varies from 1:110 to 1:3000); S. Tsumakato, et al., *An Experimental Study on the Ethanol Ratio of Breath to Blood*, 37 JAPAN J. LEGAL MED. 823 (1983) (concluding that 1:2100 breath-to-blood conversion ratio varies widely from person to person and changes according to each person's individual rate of absorption and elimination); A.W. Jones, *Viability of the Blood-Breath Ratio in Vivo*, 39 J. STUD. ALCOHOL 1931 (1978) (reporting on experiments performed at Sweden's Karolinska Institute that suggest that blood-breath ratios vary in individuals, and within those individuals at different times); David Polin, Annotation, *Challenges to Use of Breath Tests for Drunk Drivers Based on Claim that Partition Conversion Ratio Between Measured Breath Alcohol and Actual Blood Alcohol is Inaccurate*,

son with a lower conversion ratio, e.g., 1:1500, with an actual blood-alcohol concentration of .07, would score .10 on an accurate breath test which, like all breath tests, does not take the subject's lower conversion ratio into account.[43] Conversion ratios vary because the air leaving a test subject's mouth does not always have the "average man's" temperature of thirty-four degrees centigrade, and a higher mouth air temperature means a lower conversion ratio and a falsely higher breath test score. In addition, at least one scientist has concluded that *body* temperature also affects the blood to breath conversion ratio, suggesting that a one degree temperature increase may produce a 6.5% error due to the machine's 1:2100 conversion ratio.[44]

The legal response to this scientific evidence has generally been twofold, with some courts holding that scientific evidence of intoxilizer inaccuracy may be used to evince a total lack of reliability of breath tests, resulting in suppression or reduction of test results, while other courts have ruled that general or specific proof of variability of the conversion ratio is admissible, but merely goes to the weight to be accorded the test results by the trier of fact, and does not require reduction of the test results based upon the individual's particular conversion ratio, or upon general evidence of ratio variability.[45]

In *State v. McGinley*,[46] a New Jersey Superior Court de-

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90 A.L.R. 4th 155 § 2(a) (1999) (explaining how Henry's Law of physics has been applied to develop breath testers).

[43] EDWARD FITZGERALD, INTOXICATION TEST EVIDENCE, § 28.1 (2d ed. 1995).

[44] *See* TAYLOR, *supra* note 29, at 293-94 (citing Michael Hlastala, *Physiological Errors Associated with Alcohol Breath Testing*, THE CHAMPION July 1985, at 16 (finding that fever may cause higher test scores in certain individuals).

[45] For an excellent discussion of the various responses of courts to scientific studies on the partition ratio, see Polin, *supra* note 42, at §§ 10(a), (b).

[46] 550 A.2d 1305 (N.J. Super. Ct. Law Div. 1988), *overruled by* State v. Downie, 550 A.2d 1313 (N.J. Super. Ct. App. Div. 1988). In *Downie*, the Superior Court of New Jersey held that because the New Jersey Supreme Court, in *Romano v. Kimmelman*, 474 A.2d 1 (N.J. 1984), held judicial notice should be given to breathalyzer test results in D.W.I. cases, "new scientific challenges to those results and to the tests themselves [are] inadmissible except as offer of proof for purpose of making a record." State v. Downie, 550 A.2d 1313, 1313 (N.J. Super. Ct. App. Div. 1988).

In its ruling, the *Downie* court (New Jersey's court of appeals) expressed

cided that scientific evidence (in *McGinley*, expert testimony by the leading expert in the field, Dr. Kurt Dubowski) was admissible to show lack of reliability of breathalyzer tests.[47] Declaring that Dr. Dubowski was considered by all testifying experts to be the leading breathalyzer expert in the field of breathalyzer analysis, the court noted that the defense based its case on several of his theories: (1) that a breathalyzer designed to test persons with a conversion ratio of 1:2100 can produce erroneously high test results in 14% of the population; (2) the temperature of the machine varies and can produce false results; (3) fluctuating body temperatures can produce falsely high results; and (4) Hemocrit (solid particles in blood) levels vary between male and female subjects, affecting test results.[48]

The *McGinley* court sided with defense experts and ruled (in several consolidated cases) that, in light of the scientific evidence, and despite the fact that the breathalyzer was an accepted scientific instrument, the burden was not upon the

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deep concern about having no choice but to overrule *McGinley*. It explained that it did so only because the New Jersey Supreme Court had entered an order (similar to Mississippi Supreme Court Orders establishing or amending Mississippi Rules of Civil Procedure) that required courts to take judicial notice of the scientific accuracy of breathalyzers used in New Jersey. The court expressed great concern largely because it felt the new supreme court rule flew in the face of recent scientific studies in the inaccuracy of breath testing machines. Defenses based on those studies, the court noted, had "ripened into a more plausible attack based upon the new data." *Downie*, 550 A.2d at 1315. The *Downie* court opined that, because of the supreme court's judicial notice order, "there may be constitutional ramifications if these [scientific] allegations are proved." *Id.* This was particularly a concern, the court added, where the 2100/1 partion ratio was concerned, because if correct, the theory held that "inebriated drivers may pass, while comparatively sober drivers may fail a breathalyzer test." *Id.* at 1316. Nevertheless, the lower appellate court found itself bound by the supreme court's order which stated that "judicial notice 'shall' be taken of the scientific reliability of the breathalyzers," so it had no choice but to overrule *McGinley*. *Id.* at 212.

However, for the purposes, the *McGinley* rationale concerning the partion ration is not diminished by *Downie*, although New Jersey defendants will not be able to overcome the judicial notice order until further New Jersey Supreme Court review of (1) a case producing a complete record involving proof of the 2100/1 theory, (2) a constitutional challenge to the order, or (3) the court's own rule concerning judicial notice of breathalyzers.

[47] *McGinley*, 550 A.2d at 1310-12.

[48] *Id.* at 1036, 1309-12.

defendants to show that their blood-breath ratios were 1:2100; the State bore the burden of establishing all conditions for the admissibility of the breathalyzer results.[49] Where, the court continued, the defense offers expert testimony which impugns the accuracy of the test regarding conversion ratios and other matters, the State must rebut such evidence, or the breathalyzer results must be suppressed or reduced according to Dr. Dubowski's calculations, i.e., by .055%.[50]

Similarly, in *State v. Burling*,[51] the Nebraska Supreme Court considered a defense expert witness's testimony that the conversion formula built into the intoxilyzer assumed a 1:2100 ratio, but that ratios varied from 1:1100 to 1:3400.[52] A pharmacologist testified that if the defendant's breath test partition ratio (conversion ratio) was 1:1100, constituting a 52.38% reduction from 1:2100, then his test result of .164 should accordingly be reduced to .086, an amount less than the legal intoxication limit of .10%.[53] The court agreed, and ruled that the intoxilyzer breath test result could not be used to establish a "per se" violation by the defendant."[54]

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[49] *Id.* at 1309.

[50] *Id.* at 1309-10, 1312.

[51] 400 N.W.2d 872 (Neb. 1987), *overruled by* State v. Baue, 607 N.W.2d 191 (Neb. 2000).

Baue overruled *Burling* only to the extent that it held that chemical tests may be found inaccurate *as a matter of law* where the prosecution offers no expert testimony on the 2100/1 partion ratio to rebut a defense expert's testimony on the issue. The *Baue* court ruled that *no expert's opinion* on the issue of breathalyzer accuracy was binding on trial courts, and that no trial court was bound as a matter of law to follow any expert's opinion as to the inaccuracy or accuracy of the breathalyzer. *Baue*, 607 N.W.2d at 200-01. In other words the defense and prosecution are both welcome to introduce expert testimony on the accuracy of breathalyzers, particularly regarding the 2100/1 partion ratio issue, but the trier of fact is not bound to accept the testimony of any such expert, even, for example, when the prosecution does not offer an expert in rebuttal of a defense expert. Clearly, the *Baue* decision does not in any way prohibit the defense's use of experts to prove breathalyzer inaccuracy as to the partion ratio or any other theory; it merely expressed the opinion that the acceptance or rejection of such expert testimony should be left to the trier of fact.

[52] *Burling*, 400 N.W.2d at 876.

[53] *Id.* at 877.

[54] *Id.* The court nevertheless affirmed the defendant's conviction despite the exclusion of the breath test results, since other evidence of intoxication was overwhelming. *Id.*

The Nebraska Supreme Court later ruled that, in deciding *Burling,* it had not intended to hold that every defendant's breath test result should be reduced by 52.38%, but only to suggest that adjustments be made in accordance with the credible evidence adduced in each case.[55] Even so, these Nebraska courts clearly took the position that if expert testimony establishes that a breath test subject's partion ratio is below the norm, a corresponding reduction of the breath test result may be in order.

Other courts have taken a more conservative approach, holding that partition ratio evidence, general or specific to a particular defendant, is admissible at trial, but does not guarantee a defendant the benefit of a reduction or suppression of test results.[56] Such evidence, these courts have determined, goes merely to the weight of the evidence, leaving the trier of fact free to disregard, reduce or accept the breath test results based upon the testimony adduced in each individual case. The Mississippi Supreme Court, relatively conservative on D.U.I. issues, may very well adopt this line of reasoning.

In any event, in *Fisher v. City of Eupora*,[57] the Mississippi Supreme Court ruled that D.U.I. defendants may introduce general evidence of the variability of the breath to blood conversion ratio, as well as expert testimony as to their own individual conversion ratios.[58] As to what use the court will make of such evidence, only time and an appeal on that issue will tell.

2. The Relate Back/Extrapolation Rule

Although an intoxilyzer measures a suspect's breath alcohol concentration (BrAC) at the time of a breath test, the relevant legal factor is the suspect's BrAC at the time he or she *was driving*.[59] The problem, therefore, as one scientist

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[55] State v. Babcock, 419 N.W.2d 527, 530 (Neb. 1988).

[56] *See, e.g.*, State v. Hofer, 512 N.W.2d 482, 484 (S.D. 1994); People v. Thompson, 265 Cal. Rptr. 105, 108 (Cal. App. Dep't Super. Ct. 1989); People v. Brown, 540 N.Y.S.2d 650, 653 (N.Y. Crim. Ct. 1989); State v. Gates, 777 P.2d 717, 721 (Haw. App. 1989).

[57] 587 So. 2d 878 (Miss. 1991).

[58] *Id.* at 888.

[59] MISS. CODE ANN. § 63-11-30 1(c) (Supp. 2002) makes *driving* with a BAC of

has explained, is that:

> [A] person's BAC continually changes due to factors of absorption, distribution and elimination. Knowledge of the time at which peak BAC occurr[s] is critical to attempt to relate a test result to a prior time, since before that point, BAC is rising, and subsequent to that point, BAC is decreasing.[60]

In other words, the breath test result is not accurate unless absorption has peaked and completed, and this takes from between fourteen to eighty-four minutes after consumption, according to Dr. Kurt Dubowski.[61] The absorption rate varies, Dubowski says, because of the weight, sex, and physical condition of the individual, as well as the amount of food in his or her stomach, and how long after drinking the test was given.[62] Dubowski wrote that, "[T]he circumstances of some arrests and their time frames strongly suggest that failure of the subjects to be post-absorptive could lead to his breath's yielding a significantly higher blood alcohol concentration than present in venous blood."[63] Said another way, if a suspect's BAC or BrAC is rising when he is tested, his test result will not accurately reflect his BrAC at the time of *driving*. He could be sober (.07) when driving and legally intoxicated (.10) when tested.

Simpson, another noted expert in the field of blood alcohol analysis, concluded that "breath testing is not a reliable means

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.08 a crime. This is the "per se" charge–the only one with which we are concerned in the sections of this article dealing with potential breath test inaccuracies.

[60] HARVEY M. COHEN & JOSEPH B. GREEN, APPREHENDING AND PROSECUTING THE DRUNK DRIVER, § 6.07 (2001).

[61] *Id.* at 6-47 (citing Kurt Dubowski, Ph.D., *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, J. STUD. ALCOHOL 98, Supp. No. 10 (1985).

[62] Dubowski, *supra* note 61, at 98-99; *see also*, A.W. Jones, *Peak Blood-Alcohol Concentration and the Time of its Occurrence after Rapid Drinking on an Empty Stomach*, 36 J. FORENSIC SCI. 376 (1991) (absorption of alcohol in the blood found to vary due to such factors as "drinking pattern, the type of beverage consumed, the fed or fasted state, the nature and composition of foodstuff in the stomach, the anatomy of the gastrointestinal canal, and the mental state of the subject . . . ").

[63] Kurt Dubowski & M.F. Mason, *Breath-Alcohol Analysis: Uses, Methods and Some Forensic Problems–Review and Opinion*, 21 J. FORENSIC SCI. 9, 29 (1976).

of estimating a subject's BAC during absorption. . . . There is a significant likelihood that a given subject will be in the absorptive state when tested under field conditions."[64] Simpson believes that, because of the intoxilyzer's failure to account for absorption changes, "at least 23% of subjects tested will have their actual blood-alcohol concentration overestimated."[65]

Consequently, the issue, from a legal standpoint, is in extrapolation, or relating a suspect's BAC test result back to the time of his or her driving,[66] so an accurate determination can be made as to BAC or BrAC while driving, rather than when tested. Viewing this problem through the scientific lens afforded by Dr. Dubowski and his fellow blood-alcohol experts, the courts have reached three different conclusions about the use of breath test results in "per se"[67] D.U.I. cases in American courts.

A landmark decision on this issue was *Desmond v. Superior Court*,[68] in which the Arizona Supreme Court first considered the variables affecting blood-alcohol tests by intoxilyzers, specifically those noted by Dr. Kurt Dubowski in his article, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*.[69] One of those variables, Dubowski said, was the absorption rate and how long after drinking the test was offered.[70]

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[64] TAYLOR, *supra* note 29, at 347. (citing G. Simpson, *Accuracy and Precision of Breath Alcohol Measurements for Subjects in the Absorptive State*, 33 CLINICAL CHEMISTRY 753 (1987)).

[65] *Id.*

[66] Of course, extrapolation is impossible to prove if there has been intervening consumption of alcohol between operation and testing, as held in *United States v. Dubois*, 645 F.2d 642, 644-45 (8th Cir. 1981) (evidence held insufficient to prove intoxication while driving where suspect consumed alcohol after driving but before the arrest).

[67] The courts draw a distinction between the "per se" cases, where the prosecution attempts to convict solely on the presumption of guilt based upon the breath test result of over .08 or .10, and the charge of driving under the influence, based upon signs of impairment such as slurred speech, weaving, failed field tests, etc. The analysis in this section is relevant only to "per se" charges.

[68] 779 P.2d 1261 (Ariz. 1989).

[69] *Desmond*, 779 P.2d at 1266 (citing Kurt Dubowski, *Absorption, Distribution and Elimination of Alcohol Highway Safety Aspects*, 10 J. STUD. ALCOHOL 98, Supp. No. 10 (1985)).

[70] *Desmond*, 779 P.2d at 1266.

In *Desmond*, a driver was tested less than an hour after drinking two shots of peppermint schnapps.[71] Although the officer observed symptoms of intoxication such as bloodshot eyes and odor of alcohol, he did not request any field tests because of the defendant's physical disabilities.[72] The court ruled that a breath test given within a reasonable time after an arrest is relevant under Rule 401 of the *Arizona Rules of Evidence*, and may be admitted into evidence without the foundation of relating the BAC back to the time of arrest.[73] However, the court continued, when no relate back evidence is offered by expert testimony, the trial court should admit only the portion of the test result that indicates presence of alcohol, *but not the percentage* (emphasis mine), and give an instruction, pursuant to Rule 105 of the *Arizona Rules of Evidence* that the evidence is admitted for the limited purpose of showing that the defendant had alcohol in his blood without more, and that it may not be used to show that the defendant was under the influence at any particular time.[74] Standing alone, the court concluded, such evidence is insufficient to gain a conviction under the "per se" subsection of the statute.[75] The expert testimony that the state was required to use for relate back evidence was an expert who by training, education, profession or experience, possessed superior knowledge about the subject matter, as per Rule 702 of the *Arizona Rules of Evidence*.[76] Since no such evidence was offered, the court concluded, the defendants' "per se" convictions were reversed.[77]

Other courts have taken a harsher view of the

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[71] *Id.* at 1262-63.

[72] *Id.* at 1263.

[73] *Id.* at 1266; *accord* State v. Geisler, 576 A.2d 1283, 1293 (Conn. App. Ct. 1990), *vacated on other grounds by* Connecticut v. Geisler, 498 U.S. 1019 (1991) (holding that the prosecution must relate a D.U.I. suspect's BAC to the time of operation to establish a "per se" offense of over .10%).

[74] *Id.* at 1266-67 (emphasis added); *accord* State v. Dumont, 499 A.2d 787, 789 (Vt. 1985) (without expert-offered relate back evidence, breath test results could only be admitted to prove alcohol in the driver's blood, but the test result percentage would be excluded).

[75] *Desmond*, 779 P.2d at 1267-68.

[76] *Id.*

[77] *Id.* at 1268.

prosecution's failure to offer relate back testimony in "per se" D.U.I. cases. In *United States v. Wight*,[78] the court cited *Desmond*, relating in full Dr. Kurt Dubowski's findings as noted by the *Desmond* court, and found that the prosecution failed to prove its "per se" case where the D.U.I. arrest was made at 6:15 a.m., and the breath test given at 8:27 a.m., and the prosecution offered no evidence that "relates back the test to the actual time of driving."[79] Before the statutory presumption of intoxication created by a breath test result of over .10 could be applied to a defendant, the court declared, the prosecution must offer some qualified expert testimony pertaining to the defendant's BAC or BrAC at the time of arrest, as well as at the time of taking the breath test.[80]

Again, in *McCafferty v. State*[81] and *State v. Ladwig*,[82] it

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[78] 884 F. Supp. 400 (D. Colo. 1995).

[79] *Wight*, 884 F. Supp. at 403.

[80] *Id.*

[81] 748 S.W.2d 489, 491 (Tex. Crim. App. 1988), *overruled by* Gardner v. State, No. 14-00-01525-CR, 2002 WL 576073 (Tex. App. Apr. 18, 2002) (test given two hours after accident held insufficient to sustain conviction on "per se" charge without expert relate-back testimony).

Gardner overruled *McCafferty* on other grounds not specifically related to the extrapolation defense. In *McCafferty*, the court granted a motion to dismiss because it could not rule out the reasonable hypothesis of innocence raised by the state's inability to disprove the defendant's allegation that she consumed alcohol between the time of driving and taking the breath test. *McCafferty*, 748 S.W.2d at 491. In *Gardner*, where a driver admitted to drinking before driving and failed both field and breath tests, but also offered another witness's testimony that he drank from a water bottle between the time of driving and taking the breath test, the court held that, in the absence of proof as to the substance consumed from the bottle, the defendant's motion to dismiss was properly denied. *Gardner*, 2002 WL 576073, at *2-3. The *Gardner* court based its decision on the newly accepted Texas standard for sufficiency of the evidence, which allowed trial courts to review the evidence presented in a hearing on motion to dismiss in the light most favorable to the prosecution. *Id.* at *3. At the time *McCafferty* was decided, the court noted, the standard for sufficiency of the evidence had been that the state was required to exclude any reasonable hypothesis of innocence, including whether the driver may have consumed alcohol *after* driving. *Id.* at *2. Under the new standards, the *Gardner* court related, the state did not have to exclude any reasonable hypothesis of innocence, such as the possibility of drinking after driving. *Id.*

The *Gardner* decision was merely an expression of a new legal standard for sufficiency of the evidence, and in no way limits Texas DUI defendants from offering proof at trial regarding the inaccuracy of breathalyzer results because of the state's failure to offer expert testimony relating breath test results back to

was held that when breath tests are given one or more hours after the arrest, evidence of the breath test results are insufficient to support a "per se" charge where no expert testimony is offered to relate the test results back to the time of driving.[83]

And at least one court has held that defense expert testimony regarding even the possibility of a rising BAC is sufficient, standing alone, to warrant a directed verdict in favor of an accused driver where the prosecution has proceeded with a "per se" charge. In *Commonwealth v. Modaffare*,[84] the court held that where a state's expert testified that defendant's BAC may have been rising at the time of the breath test (.108), such evidence left the jury guessing as to whether the defendant's BAC was over .10, and justified the lower court's granting of the defendant's motion for a directed verdict.[85]

Conversely, other courts accord little or no significance to the government's failure to offer relate back testimony. In *United States v. Sauls*,[86] the court decided that a reasonable time for administering breath tests was within three hours of arrest, but after that time it is in a court's discretion whether to admit test results into evidence.[87] Trial courts must also consider, the *Sauls* majority declared, whether there exists any evidence that the accused may have consumed alcohol between the time

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the time of driving.

[82] 434 N.W.2d 594, 595-96 (S.D. 1989) (breath test given one hour and fifteen minutes after arrest held insufficient to establish a blood alcohol content of over .10 in "per se" charge prosecution).

[83] *See also* Commonwealth v. Loeper, 633 A.2d 669 (Pa. 1995) (two hour delay between arrest and breath test held insufficient to warrant introduction into evidence of test result of .141 in prosecution of "per se" charge, where no relate back evidence offered by prosecution).

[84] 601 A.2d 1233 (Pa. 1992).

[85] *Modaffare*, 601 A.2d at 1236. Regardless of the use made of such defense expert testimony on extrapolation, most courts allow defendants to offer such expert testimony to challenge either admissibility or the weight of the evidence. *See, e.g.*, State v. Allen, 514 A.2d 879, 883 (N.J. Super. Ct. Law Div. 1986) (defendants held to have absolute right to introduce expert testimony on extrapolation); State v. Drown, 532 A.2d 575, 576-77 (Vt. 1987) (ruling that the trial judge's failure to instruct the jury on defendant's extrapolation defense required reversal, when the state's expert testified that the defendant's could have had a BAC of .085 when he drove, despite actual test results of .14).

[86] 981 F. Supp. 909 (D. Md. 1997).

[87] *Sauls*, 981 F. Supp. at 926.

of driving and taking the test.[88] In *Haas v. State*,[89] the court ruled that retrograde extrapolation evidence was unnecessary, and that any delay in testing goes to the weight of the evidence, not to the admissibility of the test results.[90]

In any event, it is conceivable, in light of available scientific evidence, that Mississippi's appellate courts will require relate back testimony in "per se" cases, especially where the test is given more than three hours after the arrest. Whether they will take the more conservative *Desmond* approach and limit the use of breath tests offered without relate back evidence, or adopt the *Ladwig* reasoning and dismiss "per se" cases where no expert relate back testimony is offered by the prosecution, remains to be seen.[91]

3. Inherent Margin of Error

Experts are in near-universal agreement that breath testing machines such as the Intoxilyzer 5000, currently being used in Mississippi, are prone to an inherent margin of error. Leading American breathalyzer expert, Dr. Kurt Dubowski, has stated that he believes the margin of error to be .03%.[92] In other words, if a breath test yields a result of .102, then based solely upon the machine's margin of inherent error, the test result should be reduced to .009, or increased to .105.

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[88] *Id.*

[89] 567 So. 2d 966 (Fla. Dist. Ct. App. 1990).

[90] *Haas*, 567 So. 2d at 971.

[91] The recent case of Wash v. State, 790 So. 2d 856 (Miss. Ct. App. 2001), probably offers little guidance on this issue. In *Wash*, the Court of Appeals considered whether a delay of two-and-a-half to three hours in giving a breath test in accordance with MISS. CODE ANN. § 63-11-8, the D.U.I. homicide statute, required exclusion of the test. *Id.* at 859. The court decided in the negative, but noted the lack of Mississippi precedent on the issue, and that the statute had been earlier declared unconstitutional in *McDuff v. State*, 763 So. 2d 850 (Miss. 2000). *Id.* at 859. In any event, that statute has little in common with the D.U.I statute, MISS. CODE ANN. § 63-11-30 1(c) and does not address any extrapolation issues, so courts considering DUI issues are not necessarily bound by the *Wash* decision.

[92] *See State v. McGinley*, 550 A.2d 1305, 1310 (N.J. Super. Ct. Law Div. 1988) (citing ERWIN, DEFENSE OF DRUNK DRIVING CASES (3d ed. 1986) which cites Dubowski, and also cites his testimony in a 1980 Alaskan D.U.I. case.) The Intoxilyzer 5000 Manual agrees with the .03 figure.

When presented with scientific evidence or expert testimony in this context, most courts have responded in one of two ways: either holding that the trier of fact is required to take the margin of inherent error into consideration and reduce a test score accordingly, or by deciding that the trier of fact is not so bound and may simply apply the margin of error to the weight of the evidence. The difference lies in a matter of statutory interpretation.

This interpretation quandary was discussed at length in *Haynes v. State*,[93] where a driver had scored .106 on an Intoximeter 3000 test, and that machine had a recognized margin of error of .01, leading the court to the conclusion that the driver's actual BAC could have been as high as .116 or as low as .096.[94] The relevant Alaskan D.U.I. statute made it a crime for citizens to drive a vehicle with "0.10 grams or more of alcohol per 210 liters of the person's breath."[95] The court noted that there was no statutory indication; that the Alaskan legislature considered the inherent margin of error of the Intoximeter 3000 when it set a legal intoxication limit of .010.[96] The court also noted that the legislature did not adopt the use of any particular breath testing machine, but instead authorized state officials to approve satisfactory techniques, methods and standards of testing.[97]

In deciding whether a hearing officer should apply the inherent margin of error to test results or to ignore the margin of error on grounds that the legislature had already considered it when setting the .010 limit, the *Haynes* court declared that the analysis of the issue of inherent margin of error in previous decisions rendered in other jurisdictions,

> . . . hinged on whether the particular court interpreted its jurisdictional DWI statute to create an offense upon a *test reading* in excess of their statutory limit, or upon *an actual level of alcohol* in excess of the limit. Courts that interpret

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[93] 865 P.2d 753 (Alaska 1993).
[94] *Id.* at 754.
[95] ALASKA STAT. § 28.35.030(a)(2) (2000).
[96] *Haynes*, 865 P.2d at 755-56.
[97] *Id.*

> their DWI statute to create an offense upon a test reading in excess of the statutory limit presume that the legislature considered the inherent risk of error in the chemical analysis and found it to be tolerably inaccurate; thus the courts did not require the fact finder to consider the inherent margin of error if a particular testing device . . . In contrast, courts that interpret their DWI statute to create an offense upon an actual level of alcohol do not presume that their legislature considered the inherent margin of error of a chemical test; thus, those courts require the fact finder to consider the inherent margin of error before rendering a decision.[98]

Applying this analysis to the Alaskan D.U.I. statutory scheme, the *Haynes* court held that Alaskan courts should consider the inherent margin of error in D.W.I. cases, in criminal prosecutions or civil license revocation hearings.[99] It reversed the trial court's revocation of the driver's license because the margin of error would have reduced the driver's score below the 0.10 limit.[100]

The *Haynes* reasoning is bourn out in the difference in the wording of D.U.I. statutes in Nebraska and Texas. In *State v. Bjornsen*,[101] the court considered a Nebraska statute which made it unlawful for any person to operate a vehicle with a blood alcohol content in excess of .10%[102] When a chemist testified that the machine had an inherent margin of error of .005 and that such a margin could reduce the defendant's breath test result to below .10%, the court applied the margin reversing the lower court's judgment of guilt.[103]

Conversely, the *Slagle v. State*[104] court noted that a relevant Texas D.U.I. statute created a presumption of intoxication upon a test score of .10 or above, and made no reference to the amount of alcohol in a suspect's blood.[105] Accordingly, the

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[98] *Id.* at 755 (footnote omitted).
[99] *Id.* at 755-56.
[100] *Id.* at 756-57.
[101] 271 N.W.2d 839 (Neb. 1978).
[102] *Bjornsen*, 271 N.W.2d at 840 (citing NEB. REV. STAT. § 39-669.11).
[103] *Id.*
[104] 570 S.W.2d 916 (Tex. Crim. App. 1978).
[105] *Slagle*, 570 S.W.2d at 917 n.1 (citing TEX. PENAL CODE ANN. § 2.05(2)(B) (Vernon 1977).

court allowed testimony regarding the machine's inherent margin of error but merely applied it to the weight of the evidence, which the jury was free to adopt or disregard.[106] The *Slagle* court affirmed the jury's verdict of guilt.[107]

Applying these cases to our Mississippi implied consent statutes, it seems likely that our highest court will adopt the *Haynes* rationale and require the lower courts to take the inherent margin of error of the Intoxilyzer 5000 into account to reduce breath test scores. This is so because Mississippi's relevant D.U.I. statute provides that it is unlawful for a person to drive who "(c) has an alcohol concentration of ten one hundredths percent (.10%) . . . in the person's blood based upon grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis" of breath, blood or urine.[108] Conversely, the Texas statute makes it a crime to drive with a test result of over .10%, and partially defines "alcohol concentration" as meaning the number of grams of alcohol per 210 liters of breath.[109]

Not only is Mississippi's scheme similar in form and substance to those in states such as Alaska and Nebraska (and different from the test-only-presumption statutes such as the Texas statute interpreted in *Slagle*), there is no indication on the face of Mississippi's DUI statute that the legislature took the inherent margin of error factor into consideration when drafting the statute and setting the .10 limit, or that it prescribed the use of any particular breath testing machine.

Consequently, the Mississippi Supreme Court should adopt an interpretation of our statute that is consistent with the reasoning applied in *Haynes* and *Bjornsen*.[110]

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[106] *Slagle*, 570 S.W.2d at 919.

[107] *But see* State v. Boehmer, 613 P.2d 916, 917-18 (Haw. App. 1980) and People v. Campos, 188 Cal. Rptr. 366, 370 (Cal. App. 1982), where courts interpreting presumption-oriented statutes nevertheless held that lower courts were free to disregard the presumption of guilt created by a test score if the margin of error could possibly cause a legal test result to exceed the acceptable limit.

[108] MISS. CODE ANN. § 63-11-30(1)(c). This language is similar to that of the Alaskan and Nebraska statutes, in that it makes no mention of a presumption, and discusses the legal amounts of alcohol in the blood.

[109] TEX. PENAL CODE ANN. § 49.01(1)(A), (2)(B) (Vernon 2001).

[110] The Mississippi Court of Appeals considered the issue of a .02 margin of

4. General Sources of Machine Error

Although many law enforcement officers will attest to the supposed accuracy of breath testing machines, the fact remains that these machines are electronic devices, and as such, are susceptible to error. The scientific community has certainly reached that conclusion in recent years. It has found that a number of factors adversely affect intoxilyzers and cause a falsely high reading. These included methanol gas in a subject's gastrointestinal tract,[111] breathing solvent vapors,[112] radio frequency interference (RFI) and power surges,[113] inaccurate simulator calibration,[114] mouth alcohol,[115] tobacco in the

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error in the case of *Nicholson v. State*, 761 So. 2d 924 (Miss. Ct. App. 2000), but decided not to rule on the matter since the appellant failed to properly preserve the matter in the record for appeal.

[111] *See* G. Eric Geiss & R. Wayne Woodall, *Strategies in Handling DUI Cases in Mississippi*, 508 (Jan. 1999) (citing Stanley J. Broskey, *Intestinal Gas and DWI Breath Test*, DWI J. LAW & SCIENCE (June 1995) (finding that intestinal gas, or methyl alcohol, can be absorbed into the bloodstream from the gastrointestinal tract and artificially inflate BAC scores. This gas may be caused by stress, anxiety and intake of broccoli, lima beans, cabbage, brussels sprouts, fatty foods, melons, green apples, prunes and dairy products)).

[112] *See* Senk, *The Affect of Organic Solvents on Evidential Breath Testers*, 1 DWI J.: LAW & SCIENCE 4, 58 (Sept. 1986); Mary Anne Edwards et al., *Intoxilyzer Interference by Solvents*, 10 J. ANALYTICAL TOXICOLOGY 125 (1986).

[113] *See generally* William C. Head, *The Georgia DUI Defense Trial Practice Manual,* pp. 5.10-5.12 (Supp. 2001); *see* TAYLOR, *supra* note 29, at 368-69 (both noting that such devices as pagers, telephones, AM and FM radios, police station dispatchers, teletypes, and radar units located near intoxilyzers in police stations may all produce radio waves and a resulting electrical charge that can affect those machine's recording device and render false results).

[114] Regular calibration of the intoxilyzer by testing it with a simulator solution of specified alcohol concentration of 1.21 grams of 200 proof ethyl alcohol per liter of pure distilled water helps insure the machine's accuracy. But if a machine is calibrated with a solution containing an alcohol concentration that is less than the specified concentration, the machine will thereafter produce falsely inflated test results. *See* TAYLOR, *supra* note 29, at 355-57 (The five ways an intoxilizer can be falsely calibrated are (1) mixing the water and alcohol solution improperly by using the wrong amount of alcohol or using 190 proof alcohol rather than 200 proof; (2) depletion of alcohol during use of solution if the glass container is not tightly sealed or if the container is permeable; (3) replacing the alcohol vapor with room (ambient) air via improper sealing; (4) operating the simulator at a temperature other than thirty-four degrees centigrade; and (5) leakage in the tube feeding the vapor from the simulator into the machine).

[115] *See generally* RICHARD E. ERWIN, DEFENSE OF DRINK DRIVING CASES

mouth,[116] exposure to paint and glue,[117] dentures and dental adhesives,[118] asthma inhalers and mouthwash containing alcohol,[119] unclean intoxilizer mouthpieces,[120] exposure to roof tar hydrocarbons,[121] acetone-based nail polish remover,[122] diabetes,[123] sex[124] and race.[125]

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§ 21.06 at 21-49 (3d ed. 2002). Although the Intoxilyzer 5000 has a slope detector that is supposed to check for mouth alcohol, some scientists do not believe that it works, including Michael Hlastala, *Drinking/Driving Law Letter*, Clark Boardman Callaghan, Vol. 15, No. 10, at 156-57 (May 10, 1996) who states that "if mouth alcohol is present in small quantities, it will add to the normal exhaled profile of alcohol coming from the blood and alveoli . . . the [intoxilyzer] slope detector will not work correctly when alcohol is present both in the blood and the mouth. The measured BrAC will be higher than it should be . . . . the slope detector will not detect the contribution of mouth alcohol . . . . Mouth alcohol may be contributing to high BrAC values up to a 0.03 to 0.04 (in the increasing direction) error on any given test." *See also* Harry M. Cohen & Joseph B. Green, *Apprehending and Prosecuting the Drunk Driver*, § 7.04[9], at 7-107 (2001) (stating that although Intoxilyzer 5000 slope detector is effective with regard to large quantities of mouth alcohol, results as high as 0.16% based solely upon mouth alcohol have gone undetected by the slope detector).

[116] *See* United States v. Plumer, 920 F. Supp. 151, 152 (D. Kan. 1996) (breath test held inadmissible where officer failed to check to see if tobacco had been fully removed from suspect's mouth prior to giving breath test); People v. Miller, 579 N.E.2d 1237 (Ill. App. 3d 1991) (test held invalid where driver chewed tobacco and swallowed it within fifteen minute observation period prior to breath test).

[117] *See* TAYLOR, *supra* note 29, at 324 (citing 7(4) DRINKING/DRIVING NEWSL. 3 (Feb. 19, 1988) (Demers Laboratory tested painters exposed to glue and paint and obtained .12 readings, despite no presence of alcohol)).

[118] *See generally* TAYLOR, *supra* note 29, at 344.

[119] WILLIAM C. HEAD, THE GEORGIA DUI DEFENSE TRIAL PRACTICE MANUAL, 5.10-5.12 (Supp. 2001).

[120] *See* State v. Amant, 504 So. 2d 1094, 1097 (La. Ct. App. 1987) (intoximeter test results (.18) held inadmissible when State failed to prove that officer used a clean and uncontaminated mouthpiece when he gave the defendant a breath test).

[121] *See* Clay v. State, 387 S.E.2d 644, 645-46 (Ga. Ct. App. 1989) (expert testified that .18 breathalyzer reading was related to defendant's exposure to roof tar hydrocarbons).

[122] *Id.*

[123] *See* TAYLOR, *supra* note 29, at 329 (citing John Brick, *Diabetes, Breath Acetone and Breathalizer Accuracy: A Case Study*, 9(1) ALCOHOL, DRUGS, & DRIVING (1993) (finding that expired ketones in an untreated diabetic's breath can cause falsely high readings, and that when ketoacidosis (a condition occurring when blood sugar rises and the body cannot burn carbohydrates and burns fat instead, producing ketones and symptoms such as drowsiness, flushed face, slurred speech, impaired motor control, loss of energy and heavy breathing) occurs, acetone on the breath will result in the odor of alcohol; A. Manolis, *The Diagnostic Potential of Breath Analysis*, 29(1) CLINICAL CHEMISTRY 5 (1983) (acetone may

For those who nevertheless insist that the Intoxilyzer 5000 is perfect (and every defense lawyer has heard his share of this unfortunate testimony) the contrary proof in the problematic pudding comes in the form of two letters sent from Colorado and New Hampshire complaining of defects to the machine's former manufacturer, CMI., Inc., and later published in the *Drinking/Driving Law Letter*.[126] A letter from toxicologist J. Robert Zettl at the Colorado Department of Health, dated December 31, 1990, complains of printer problems ("to continue to place this printer in production models is tantamount to malfeasance"),[127] electronic problems "yielding ghost readings of from .007 to over .025,"[128] and numerous other difficulties, leading to the conclusion that "Colorado law enforcement agencies have lost faith in the Model 5000 Intoxilyzer."[129]

Another letter, penned by Susan Lefebre, Chemistry Program Manager for the Public Health Laboratory of the New Hampshire Division of Human Services, mentioned "poor correlation between infrared results [on the intoxilyzer] and sample capture analyses on field tests,"[130] condensation build up on hoses,[131] lack of uniformity in breath tubes, and printer and power supply failures.[132]

Keenly aware of these problems, Dr. Kurt Dubowski advocates strict breathalyzer procedures for minimizing machine-related errors. He suggests a fifteen minute pre-test observation period, having blank tests performed immediately before each breath specimen collection, offering two separate breath tests to be given between two and ten minutes apart, and per-

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cause higher test result and false symptoms of intoxication).

[124] For an excellent discussion see TAYLOR, *supra* note 29, at 281-82.

[125] *See id.* at 283 (citing D. Fenna et al., *Ethanol Metabolism in Various Racial Groups*, 105 CAN. MED. ASS'N J. 472 (1971) (caucasians shown to have higher metabolic rates than Native Americans, thus swifter peak absorption and elimination)).

[126] *See* TAYLOR, *supra* note 29, at 391-95.

[127] *Id.* at 392.

[128] *Id.*

[129] *Id.*

[130] *Id.* at 394.

[131] *Id.* at 395.

[132] *Id.*

forming a control test with the simulator before giving each breath test.[133]

These flaws have not gone unnoticed by the Mississippi Supreme Court. In *Fulton v. City of Starkville*,[134] the court quoted an opinion rendered in *Arizona v. Velasco*,[135] where that court noted that "[s]everal factors may affect the accuracy of Intoxilyzer test results: random error, radio frequency interference, mouth alcohol, chemical interference, insufficient alveolar samples, and operator error"[136] and in *Harkins v. State*,[137] Justice McRae's (concurring in part and dissenting in part) opinion stated that:

> The Intoxilyzer 5000 results are being excluded by some judges in the Atlanta, Georgia area. Exclusion of the results is understandable since "dental work, such as plates or bridge work, consumption of antibiotics, diet pills, and even M & M candy and white bread can cause alcohol breath-analyzing machines to register as much as a .08," which is dangerously close to Mississippi's .10% level of legal intoxication. *See* William C. Head, *Alcohol Breath Test Machine's Accuracy Disputed Nationally* (last modified June 19, 1996) http://www.drunkdrivingdefense.com/machnrel.htm. The dangers of the intoxilyzer machine are evident.[138]

Justice McRae also noted that "two [intoxilyzer] manufacturers embroiled themselves in a Kentucky lawsuit in which they attempted to show that the other manufacturer's machine was defective,"[139] and opined that those companies only succeeded in demonstrating that both of their machines were defective.[140] How our highest court will deal with these apparent defects must await the next appeal on those grounds.

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[133] *See* TAYLOR, *supra* note 29, at 295 (citing Kurt Dubowski, *Quality Assurance in Breath-Alcohol Analysis*, 18 J. ANALYTICAL TOXICOLOGY 270 (October 1994)).

[134] 645 So. 2d 910 (Miss. 1994).

[135] 799 P.2d 821 (Ariz. 1990).

[136] *Fulton*, 645 So. 2d at 914 (citing *Velasco*, 799 P.2d at 826).

[137] 735 So. 2d 317 (Miss. 1999).

[138] *Harkins*, 735 So. 2d at 322-23.

[139] *Id.* at 322.

[140] *Id.*

IV. CONCLUSION

The great extent of scientific evidence adduced toward the close of the twentieth century concerning the inaccuracy of field and breath tests for intoxication, as well as the wealth of case law in response to that evidence, clearly indicates that intoxication test results must be viewed with greater caution than before. For hard-working law enforcement officers who tirelessly strive to protect our society from random highway slaughter by removing drunk drivers from our roadways, this revelation may be just as disappointing as that of the school boy's discovery that his favorite ancient Greek philosopher regularly engaged in pederasty.

Nevertheless, for drivers falsely accused of D.U.I. because of inaccurate test results, the scientific studies and appropriate appellate court response offer an unprecedented opportunity to bring the unintentional falsehoods to light. To paraphrase Danish philosopher Sören Kierkegaard's *Attack Upon Christendom*,[141] this new information will also help judges, prosecutors and law enforcement officers "see that official [DUI procedure] is not [an accurate reflection of the true procedure and law], does not resemble it any more than the square resembles the circle. . ."[142] And to further paraphrase Kierkegaard, it will remind criminal defense attorneys that "he who must apply a 'corrective' must study accurately and profoundly the weak side of the [State's approach], and then vigorously and one-sidedly present the opposite. Precisely in this consists the corrective . . . ."[143]

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[141] SÖREN KIERKEGAARD, ATTACK UPON CHRISTENDOM (Walter Lowne trans., Princeton Univ. Press 1968).

[142] *Id.* at 42 (substituting "DUI procedure" for "Christianity" and "an accurate reflection of the true procedure and law" for "the Christianity of the New Testament").

[143] *Id.* at 90 (substituting "State's approach" for "Establishment").

COMMENTS

Special-Purpose Entities: A Description of the Now Loathed Corporate Financing Tool

How Enron Used Them to Manipulate Financial Statements and a Recommendation for New Disclosure Standards

Raison D'être: Risk Management or Financial Manipulation?

I. INTRODUCTION

A. Overview of Enron, Inc.

Enron, Inc. began as a company that bought, moved and sold natural gas.[1] Over time Enron transformed itself into a Fortune Ten company by becoming a glorified commodities trader, buying and selling electricity and natural gas like cotton futures.[2] Enron consisted of two parts: a pipeline and utility business that relied on hard assets and a speculative

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[1] Kurt Eichenwald, *Audacious Climb to Success Ended in a Dizzying Plunge*, N.Y. TIMES, Jan. 13, 2002, at A1. Enron was the result of a merger in 1985 between Houston Natural Gas, a pipeline company, and Internorth of Nebraska, another pipeline company. *Id.* Kenneth L. Lay, head of Houston Natural Gas, became the new company's Chief Executive Officer. *Id.*

[2] *Id.* (noting how Enron transformed itself from largely asset driven to service driven). Enron appeared at number seven in 2000 on the Fortune 500 list of America's largest companies. Gretchen Morgenson, *How 287 Turned into 7: Lessons in Fuzzy Math*, N.Y. TIMES, Jan. 20, 2002, at A1 (discussing how illusory this appearance was in retrospect).

energy trading business.[3] At its peak, Enron's market value exceeded $68 billion, reported revenues topped $100 billion, and the stock price traded as high as $90 per share.[4] Enron became the biggest player in the biggest game–the trading of derivatives and other futures based on the value of natural gas and electricity.[5] Enron was looked upon as the world's foremost visionary company, liberating themselves from reliance on hard assets and utilizing the Internet and E-commerce to maximize its trading enterprises.[6] Enron began to trade any and every commodity, from broadband bandwidth to wood pulp.[7]

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[3] Robert McCullough, *Deconstructing Enron's Collapse*, McCullough Research, Jan. 10, 2002, at 3 (on file with author). Enron was composed of the "relatively stodgy" pipeline and utility business and the Wholesale and Retail Services Divisions which encompassed their speculative trading operations. *Id.* Analysts note that the pipeline and utility business contributed little to the rise and fall of Enron's fortunes. *Id.*

[4] Kenneth N. Gilpin, *Plenty of Pain to go Around,* N.Y. TIMES, Dec. 4, 2001, at A1 (discussing consequences to investors of company which lost 99.5% of its market value in one year). The companies reported revenues of $101 billion were misleading due to the fact that energy trading companies are allowed to record as revenue the total amount of a trading transaction, rather than only the profits made on the trade. Morgenson, *supra* note 2, at A1. Conversely, if Enron would have been forced to book profits on trades, similar to brokerage houses, revenues would have decreased to $6.3 billion. Morgenson, *supra* note 2, at A1 (observing that Enron's profits were more ephemeral than real because in reality Enron was only earning ½ of one percent on sales).

[5] Eichenwald, *supra* note 1, at A1. By 1995, Enron controlled over one-fifth of the North American natural gas market. *Id.; see* Kurt Eichenwald, *Through the Enron Looking Glass*, N.Y. TIMES, Feb. 17, 2002, at A1 (discussing Enron's presence in other markets, particularly failure in broadband trading); *see also*, Morgenson, *supra* note 2, at A1 (discussing how even Enron's presence in these markets was inflated by the concept of notional revenues).

[6] Kurt Eichenwald & Diana B. Henriques, *Web of Details Did Enron In as Warnings Went Unheeded*, N.Y. TIMES, Feb. 10, 2002, at A1. Commentators contrast the public image of Enron–an "innovative powerhouse on the verge of reshaping the world"–with the hidden reality of a company held together by series after series of "byzantine partnerships" and financial structures. *Id.* Many analysts simply cannot understand where reality sets in with the financial numbers of Enron. Morgenson, *supra* note 2, at A1.

[7] Eichenwald, *supra* note 1, at B1. Enron's forays into commodities trading included electricity, wood pulp, broadband, advertising time on television, and credit insurance. Eichenwald, *supra* note 1, at B1. For a discussion of Enron's greatest failure in commodities trading, see generally Kurt Eichenwald, *supra* note 5, at A1 (discussing broadband trading division's burn rate, i.e. huge cash drain,

But Enron was essentially a financial house of cards.[8] Enron and its corporate financial team had set up a series of limited partnerships which qualified as off-balance sheet special purpose entities (SPEs) that housed the company's ever growing debt load as well as large losses.[9] When the SPEs were forced to be consolidated onto the company's balance sheet, Enron was forced to wipe off more than $1 billion in shareholder equity and restate earnings by $618 million in one quarter alone, while reducing previously reported income in the years 1997 through 2000 by $569 million due to errors in accounting for transactions with SPEs.[10] In a period of six months, Enron went from the world's seventh largest company to bankruptcy.[11]

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but how accounting gimmicks created appearance of profitable enterprise).

[8] Daniel Altman, *Enron Had More Than One Way to Disguise Rapid Rise in Debt*, N.Y. TIMES, Feb. 17, 2002, at A1 (discussing how Enron masked its weakening financial condition). Enron used a variety of methods, not just special-purpose entities (SPEs) to hide its' debt load from investors. *Id.* These methods included booking loans as "assets from price risk management," which manipulated the price risk management account, and reflecting other loan transactions as hedging activity. *Id.; see also* Kurt Eichenwald & Jonathan Glater, *Documents Show Two Sides of Enron Partnerships*, N.Y. TIMES, Feb. 14, 2002, at A1 (noting two versions of reality at Enron and resulting information gap to investors).

[9] Eichenwald & Henriques, *supra* note 6, at A1. The deals with the SPEs and limited partnerships allowed Enron to keep hundreds of millions of losses off the books. Eichenwald & Henriques, *supra* note 6, at A1. An investigative commission set up by Enron's board of directors acknowledges many of these transactions had no economic merit. WILLIAM C. POWERS, JR. ET AL., ENRON CORPORATION, REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMISSION OF THE BOARD OF DIRECTORS OF ENRON CORPORATION, Feb. 1, 2002, at 37, *available at* http://news.findlaw.com/hdocs/docs/enron/sicreport/sicreport020102.pdf [hereinafter POWERS REPORT]. Enron analysts have uncovered, so far, over 4,000 SPEs set up by Enron corporate financiers. Morgenson, *supra* note 2, at A1.

[10] POWERS REPORT, *supra* note 9, at 2-8 (noting that reductions were result of SPEs no longer meeting requirements to be carried off-balance sheet); *see* Eichenwald, *supra* note 2, at A1 (discussing effect of unraveling deals on share prices and domino effect of consolidation of SPEs); *see also* Daniel Fisher, *Shell Game*, FORTUNE, Jan. 7, 2002, at 52 (discussing how Enron's originally unconsolidated SPEs were forced to be consolidated).

[11] POWERS REPORT, *supra* note 9, at 2. Enron filed for bankruptcy on December 2, 2001. POWERS REPORT, *supra* note 9, at 2. *See generally* Bethany McLean, *Why Enron Went Bust: Start With Arrogance. Add Greed, Deceit and Financial Chicanery*, FORTUNE, Dec. 24, 2001 (discussing particulars of Enron's path to bankruptcy).

B. The Pandora's Box Opened by Enron

Enron presents a quagmire of legal, accounting and financial market regulation issues.[12] The fall of Enron has left

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[12] Harvey L. Pitt, *How to Prevent Future Enrons*, WALL ST. J., Dec. 11, 2001, at A18 (noting that no issue should be off the table in wake of Enron). The chairman of the SEC faces a tough challenge in that he must determine whether the SEC's current financial disclosure requirements are adequate to ensure market efficiency while continuing to meet the needs of investors. E.S. Browning & Jonathon Weil, *Burden of Doubt: Stocks Take a Beating as Accounting Worries Spread Beyond Enron*, WALL ST. J., Jan. 30, 2002, at A1 (noting also that cost of capital to corporations may rise under current system); *see also* Steve Liesman et al., *Dirty Books? Accounting Debacles Spark Calls for Change*, WALL ST. J., Feb. 6, 2002, at A1 (noting that better disclosure requirements would eliminate many future problems). *See generally Testimony Concerning Recent Events Relating to Enron Corporation: Hearing Before the Subcomm. on Capital Markets, Insurance and Government Sponsored Enterprises and the Subcomm. on Oversight and Investigation, Committee on Financial Services*, 107th Cong. (2002)[hereinafter Herdman] (statement of Robert K. Herdman, Chief Accountant, SEC) (discussing effect of Enron's collapse on system of capital markets). The SEC must ensure that not only are disclosure requirements stringent enough, but that disclosure rules fit the characteristics of the beneficiaries of the information. With respect to Enron, the question is, was it a lack of information or inadequate analysis that caused the market's mis-valuation of Enron?

Securities analysts have also faced heightened scrutiny as investors watched the tech-bubble burst and the demise of Enron. Richard A. Oppel, Jr., *Wall Street Analysts Faulted on Enron*, N.Y. TIMES, Feb. 28, 2002, at A1; *see also* David Leonhardt, *How Will Washington Read the Signs*?, N.Y. TIMES, Feb. 10, 2002, at A1 (discussing how securities analysts have been wrong in recent years). Many analysts never changed their recommendations for companies even as the S&P 500 fell by 28% in one year. *Id.* Even when Enron's share price was as low as thirty five cents a share, some analysts were recommending it a "strong-buy." *Id.* Many firms, including Goldman Sachs, Lehman Brothers, and UBS Warburg recommended Enron to investors even as information questioning Enron's performance was made public. Richard W. Stevenson & Jeff Gerth, *Multiple Safeguards Failed to Detect Problems at Enron*, N.Y. TIMES, Jan. 19, 2002, at A1. *But see* Nick Snow, *Financial Reporting Must be Improved*, PETROLEUM FINANCE WEEK, Dec. 24, 2001, 2001 WL 26355987 (noting that analysts may have been unable to comprehend convoluted and contradicting information Enron produced). Ironically, the legal barriers put into place to prevent information sharing between investment bankers and analysts, intended to protect investors, contributed to the overvaluation and subsequent collapse of Enron's share price. Diana B. Henriques & Kurt Eichenwald, *A Fog over Enron, and the Legal Landscape*, N.Y. TIMES, Jan. 27, 2002, at A1 (discussing "Chinese Walls": legal barriers preventing investment bankers from sharing information with stock analysts).

While there has been no evidence found yet that any banks loaned Enron money to cultivate an investment banking relationship, bankers are sure to be

lawyers, regulators, accountants, Congress and the public calling for a close examination of the laws and regulations of America's capital market system to determine whether the current system is sufficient. The focus of this comment is

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fully aware, considering the multi-billion dollars of default by Enron, of the importance of properly valuing a client's assets and all obligations a company may have, including on and off-balance sheet financing. Leonhardt, *supra*, at A1. Bankers will have to have a more cautious approach when valuing companies and their credit worthiness. Leonhardt, *supra*, at A1.

Derivative markets have also faced scrutiny. Leonhardt, *supra*, at A1. *See generally* Howell E. Jackson, *Regulation in a Multi-Sectored Financial Services Industry*, 77 WASH. U. L.Q. 319 (describing derivatives and regulatory structure which applies to them). No profession has faced as much criticism as the accounting industry in the wake of Enron's collapse. Leonhardt, *supra*, at A1; *see* Browning & Weil, *supra*, at A1 (discussing that fundamentals of accounting profession are now being questioned); *see also* Liesman et al., *supra*, at A1 (describing how accounting profession faces credibility crisis). *But see* Steve Liesman et al., *supra When Rules Keep Debt Off the Books*, WALL ST. J., Jan. 18, 2002, at C1 (describing how many accountants maintain problems are not within profession, rather with what corporations report to them). However, many critics point out FASB took too long to set proper accounting standards for SPEs and other complex financial instruments, allowing companies to manipulate earnings. *Id. See generally* THE ECONOMIST, *Nothing About Enron's Demise Was Suprising–Nor Is What Must Be Done*, Jan. 19, 2002, 2002 WL 7244854 (noting that America's accounting standards have never been so meaningless). Mr. Arthur Levit, former Chairman of the SEC, believes today's accounting standards lead to "indecipherable earnings." *Id.* Members of Congress and the investing public alike worry the conflict of interest of auditors also doing consulting work results in a less than fair evaluation of a company's financial condition and wonder if private self-regulation and oversight by the accounting industry of itself is enough. Leonhardt, *supra*, at A1Enron's bankruptcy is attributable, in part, to a massive failure in corporate governance. *Giving Meaning to the Codes of Best Practice*, FIN. TIMES, Feb. 19, 2002. Senior executives engaged in self-dealing transactions, audit committees approved misleading financial statements, the board of directors failed to supervise management decisions, and whistle blowers were ignored. *Id.* Enron's board has also received sharp criticism for failing to adequately monitor the company's financial reporting process and for approving related-party transactions that involved SPEs without being adequately informed of the nature of the transactions. POWERS REPORT, *supra* note 9, at 148-58 (discussing failures in oversight by board of directors); *see* Stevenson & Gerth, *supra*, at A1 (questioning Enron's board of directors' independence). Enron's board did not challenge a single transaction Enron's executives proposed in regards to the SPEs. Joann S. Lublin, *Inside, Outside Enron, Audit Panel Is Scrutinized*, WALL ST. J., Feb. 1, 2002, at C1.

There are a multitude of other potential issues presented by Enron and the ensuing corporate scandal which are outside the scope of this paper, including insider trading laws, bankruptcy laws, energy deregulation, 401(k) plan safeguards, and the recent changes that limit litigation against corporate offenders.

special-purpose entities (SPEs) and the fog hanging over the legal landscape in regard to them. Many securities law experts around the country have been shocked at the details of Enron's uses of SPEs in their corporate finance structure.[13] This comment describes in section two what a special-purpose entity is and describe the accounting rules for achieving off-balance sheet treatment. Section three describes how Enron used SPEs as a part of their corporate finance structure, analyze three of Enron's largest SPEs and the transactions conducted with them, discuss issues related to Enron's "control" of the SPEs and describe what Enron disclosed about the SPEs on its financial statements. In conclusion, section four provides a recommendation for new disclosure standards and rules for SPEs.

II. SPECIAL-PURPOSE ENTITIES

A. Description of SPEs

Special-Purpose Entities (SPEs) are financing vehicles originally created to perform a relatively straightforward task: isolating and managing financial risk.[14] Companies wanting to perform highly specialized or high-risk ventures can set up an SPE to off-load financing and assets to the SPE.[15] Generally the SPE takes on either corporate or limited partnership

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[13] Henriques & Eichenwald, *supra* note 12, at A1. Words like "shocked," "horrified," and "indefensible," have been used by securities experts in condemning the way Enron used SPEs as part of their financial structure. Henriques & Eichenwald, *supra* note 12, at A1.

[14] Jeremy Kahn, *Off Balance Sheet–and Out of Control*, FORTUNE, Feb. 18, 2002, at 74 (discussing SPEs original use as financial risk management tool). While complex instruments, all SPEs are not as fraught nor potentially misleading as the ones used by Enron. *Id.* Furthermore, one should not be surprised to learn that most, if not all, Fortune 500 companies use SPEs in one form or another. *Id.*

[15] *Id.* (discussing how companies use SPEs to off-load financing of large, risky ventures). *See generally* John C. Murray, 32 REAL PROP. PROB. & TR. J. 193 (1997) (discussing off-balance sheet financing as popular technique to finance asset acquisitions without creating new debt on balance sheet of sponsoring company). After Enron, corporations face numerous questions about off-balance sheet transactions which may or may not affect the corporation's overall financial well-being. Browning & Weil, *supra* note 12, at A1 (noting SEC and credit agencies are pressing corporations for better disclosure of off-balance sheet transactions).

form and the sponsoring company, i.e., the company transferring assets or financing, is allowed, if certain requirements are met, to not consolidate the SPE onto its own balance sheet.[16] This lack of consolidation allows the sponsoring company to protect the transaction while insulating itself from the risk by shifting the debt off its balance sheet.[17]

The use of an SPE can substantially improve the appearance of a company to an investor. Financial ratios are enhanced and therefore the stock valuation of a company improves because neither the asset nor financing obligations appear on the sponsoring company's balance sheet.[18] By keeping assets and financing off the balance sheet while the earnings from the SPE flow through to the income statement, a company's return on assets improves, reported earnings are increased and the debt to equity ratio is artificially deflated,

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[16] Ellisa Opstbaum Habbart & Andrew G. Kerber, *Getting the Right Fit-Some Suggestions on Finding the Best Way to Structure a Financing Transaction*, BUS. L. TODAY, Nov./Dec., 2001, at 34 (discussing how to structure SPE transactions). For a discussion of accounting disclosure requirements, see *infra* notes 34, 37-39 and accompanying text. In general, rating agencies have favored the corporate form for SPEs because of the well-developed case and statutory law in regards to creditor's rights. *Id.* However, now more SPEs are taking on the form of general or limited partnerships because of greater contractual flexibility. Habbert and Kerber, *supra*, at 34. Courts view SPEs as entities possessing the rights defined in the contractual agreement, thereby allowing transactions to be structured in ways that meet the requirements, i.e. desires, of the parties. *Id.* Although a discussion of the tax consequences of the choice of entity selection when setting up a SPE is outside the scope of this article, one should never fail to consider the tax consequences of the selection of the entity. For a discussion of the selection of entity process and tax consequences see generally Habbert and Kerber, *supra*.

[17] Kahn, *supra* note 14, at 74 (noting risk avoidance feature of SPEs); *see also* Murray, *supra* note 15, at 204-08 (discussing how creation of SPE can lead to "bankruptcy remote entity"). The SPE allows the assets to be transferred into an entity which is legally independent and structurally isolated from the transferring corporation, therefore removed from the bankruptcy risk of the transferor. Murray, *supra* note 15, at 204-08.

[18] Murray, *supra* note 15, at 209 (noting effect of creation of SPE on essential financial ratios which are essential tools to investors and analysts evaluating companies); *see* Sheila Muto & Mark Veverka, *Firms Flock to Type of Leasing*, WALL ST. J., April 2, 1997, at CA1 for a discussion of how companies use synthetic leasing–by way of a SPE–to obtain new real estate and equipment while keeping debt off their books. Companies who use synthetic leasing are allowed to get tax benefits of real estate or equipment ownership without the assets being reported on the balance sheet while freeing up capital for other projects. *Id.*

thereby increasing the stock valuation of the company in the eyes of an investor.[19]

Activities of an SPE are limited by their governing documents and are generally used for acquiring financial assets, selling or monetizing financial assets, acquiring or leasing property, plant and equipment, capital management or some combination of these activities. A typical transaction where an SPE is created is an asset backed securities transaction involving the sale of a security where the repayment is directly tied to the cash flow of a segregated pool of assets.[20] The sponsoring company will sell or transfer the asset(s) to the SPE, retain an equity interest and the remaining equity interest is sold to other investors.[21] The outside investors typically control the activities of the SPE while retaining the risks and rewards of the SPE, muck like a common stockholder in a corporation.[22]

In general, the use of an SPE reduces the cost of financing below the level of what it would have been had the transferor directly borrowed from a bank.[23] The SPE holds the assets and finances them by issuing debt and equity to institutional and private investors.[24] Then, to reduce the interest on the debt, the SPE obtains credit enhancements in the form of derivatives or guarantees from the transferor and other third parties.[25] This effectively spreads the risk amongst the par-

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[19] Murray, *supra* note 15, at 209 (noting benefits to corporate user of off-balance sheet financing). The Powers Report points out this is precisely why Enron utilized SPEs–because management knew SPEs enabled Enron to present itself much more attractively to Wall Street and rating agencies who used financial ratios to evaluate a company. POWERS REPORT, *supra* note 9, at 37.

[20] Andrew E. Katz, *Due Diligence in Asset-Backed Securities Transactions*, *in* CONDUCTING DUE DILIGENCE 2001, at 533 (PLI Corp. Law & Practice Course, Handbook Series No. B0-00WE, 2001) (describing characteristics of typical asset-backed securities transactions). More common uses of SPEs include factoring – generating cash by selling receivables – and banks using SPEs to issue debt backed by mortgage pools. Kahn, *supra* note 14, at 74.

[21] Katz, *supra* note 20, at 534-35. As will be discussed *infra*, outside investors made large profits off their equity interests in Enron's SPEs.

[22] Katz, *supra* note 20, at 534-35.

[23] *See generally* Herdman, *supra* note 12.

[24] Herdman, *supra* note 12.

[25] Herdman, *supra* note 12.

ties, and because the SPEs securities are normally liquid and easily traded, the cost of borrowing is reduced.[26]

To illustrate, suppose an oil company wants to begin a new drilling project. The oil company would set up a limited partnership which qualifies as a SPE, off-load the financing and acquired assets to the SPE, maintain an equity interest in the SPE, while the SPE sells the remaining equity interest to outside investors. If the project were to fail in any way, the company would only be liable for its equity investment in the SPE. Antithetically, if the sponsoring company went bankrupt, the company's creditors would be prevented from attacking the SPE's assets. The risk would be isolated while the company, through the equity interest, would be able to participate in growth and future revenues.

Over time, SPEs have evolved into more than a risk-isolating corporate financing vehicle and have become a way for companies to perform "cosmetic surgery" on their financial statements.[27] Originally SPEs were used mostly in synthetic lease transactions–where the sponsoring company sales an asset to the SPE and then leases the asset back [28]–but corporate financiers became more sophisticated and determined to make financial statements *appear* attractive to investors.[29]

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[26] Herdman, *supra* note 12.

[27] Kahn, *supra* note 14, at 74 (noting that management, particularly chief financial officers were in position to alter appearance of financial statements while not reflecting substantive merits of statements). Many believe now that SPEs are essential components of modern corporate finance. Kahn, *supra* note 14, at 74 (noting that most Fortune 500 companies use SPEs). Managers, whose salaries are based upon equity related pay schemes, are tempted to use SPEs to maximize share value. THE ECONOMIST, *supra* note 12 (noting that equity related pay schemes contributed to proliferation of SPEs).

[28] Murray, *supra* note 15, at 198-210. Synthetic leasing is a type of off-balance sheet financing for acquisition and development of assets. Murray, *supra* note 15, at 195. A synthetic lease involves the sale to a SPE of an asset and then the company leases back the asset. Murray, *supra* note 15, at 198-200. Enron initially used SPEs for synthetic lease transactions, including a synthetic lease for its own headquarters building in Houston. POWERS REPORT, *supra* note 9, at 37. A synthetic lessor gets a double benefit–the lease is an operating lease for accounting purposes, i.e. the leased asset is not booked as an asset nor is the lease obligation booked as a liability–while the company maintains the operating control associated with ownership. Murray, *supra* note 15, at 196-97.

[29] Patrick McGeehan, *Enron's Deals Were Marketed to Companies by Wall*

SPEs began to be used with sales of debt and equity interests and sales of hedging and other derivative transactions.[30]

In analyzing companies who use SPEs extensively as part of their corporate finance structure, one must determine the key economic aspects of the SPE, i.e., the most important determinants of the real economic situation. An SPE can be misleading to investors if the risks are not truly shifted, i.e., the transferring company guarantees the SPE's debt or value or finances the SPE with its own stock, and these obligations and guarantees are not disclosed.[31] An accurate valuation of an SPE would and should be based upon a thorough understanding of the extent of the transferring company's obligations and risk exposure in the SPE and a determination of whether the risks have truly been shifted.[32]

As the investing community is now quite aware, SPEs can be used in an inherently deceptive way. While some companies use SPEs in legitimate ways to isolate and manage risk, other companies use SPEs in ways that increase financial risks to investors. These risks occur because of the misleading effects of not consolidating the SPE onto the company's financial statements when the transferring company fails to disclose the extent of its obligations and guarantees tied up in the SPE.[33]

Street, N.Y. TIMES, Feb. 14, 2002, at A1 (discussing how investment bank groups marketed SPEs as way to "enhance appearance of balance sheets"). Bankers and corporate financiers who have become experts in the field of structured finance are known on the Street as "creative financiers." *Id.* Creative financiers help companies finance risky ventures, such as Hollywood movies and oil pipelines, off the balance sheet. *Id.*

[30] POWERS REPORT, *supra* note 9, at 37 (noting Enron's use of SPEs evolved from synthetic leasing to large scale hedging transactions).

[31] Murray, *supra* note 15, at 216-31.

[32] Murrau, *supra* note 15, at 216-31.

[33] Browning & Weil, *supra* note 12, at A1. What many investors fear is the use of SPEs and off-balance sheet financing has shifted from a risk management tool to a mechanism which prevents the understanding of the financial condition of companies. Browning & Weil, *supra* note 12, at A1.

B. Accounting Rules for Achieving Off-Balance Sheet Treatment

The current accounting rules for SPEs were formed in the context of synthetic lease transactions that isolated risk.[34] However, as discussed above, SPEs are now used to achieve off-balance sheet treatment for large or risky ventures with either heavy debt loads or large losses.[35] Off-balance sheet treatment, or non-consolidation, simply means that information does not appear on the financial statements of the sponsoring or transferring company. Therefore, non-consolidation allows a company to avoid reporting the assets, liabilities, income or losses of an SPE on its financial statements if the SPE qualifies for off-balance sheet treatment.

There are two main requirements for an SPE to qualify for off-balance sheet treatment.[36] First, the assets must be

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[34] POWERS REPORT, *supra* note 9, at 37. Companies now use SPEs to hide relevant information rather than isolate risk. Kahn, *supra* note 14, at 84. *See generally Accounting for Transfers and Servicing of Financial Assets and Extinguishment of Liabilities,* Statement of Financial Accounting Standards No. 140 (Financial Accounting Standards Bd. 2000) [hereinafter SFAS 140] (articulating rules and standards for accounting for SPEs).

Not only are current accounting rules for SPEs outdated, the entire financial reporting system may also need to be examined. Joe Berardino, *Enron: A Wake-Up Call*, WALL ST. J., Dec. 4, 2001, at A18. The current system of financial reporting was developed during the industrial age, when most assets were tangible. *Id.* A new model which is more dynamic and responsive to the needs of investors needs to be formulated. *Id. See generally* Jerry Hirsch, *Accountants Can't Keep up with Financial Complexity Auditing*, L.A. TIMES, Feb. 24, 2002, at C1 (noting other areas where accounting rules have failed to keep up with evolution of financial structure of businesses).

[35] Kahn, *supra* note 14, at 84. SPE uses were expanded beyond synthetic lease transactions and accounting rules failed to address these new uses. Kahn, *supra* note 14, at 84. Most commentators find fault with FASB and other accounting rule-making bodies for failing to quickly address these inadequacies. Steve Liesman et al., *Dirty Books? Accounting Debacles Call For a Change*, WALL ST. J., Feb. 6, 2002, at A1. *See generally*, Steve Liesman et al., *When Rules Keep Debt Off the Books*, WALL ST. J., Jan. 18, 2002, at C1 (discussing failure of accounting standard setting bodies to address off-balance sheet debt treatment).

[36] This section is not intended to provide a detailed analysis of the current accounting rules, merely a summary of the most important and relevant requirements. An in-depth discussion of the current accounting standards is outside the scope of this article, and best left to others.

transferred to the SPE and be legally isolated from the transferor and the SPE must have unconditional control over the assets.[37] Isolation exists if the assets are beyond the reach of a transferring company's creditors; i.e., a legal sale has been effectuated.[38] The second requirement is that an independent third party must have made at least a 3% capital investment in the SPE and the third party must control the assets of the SPE while assuming the risks and rewards of ownership.[39] In other words, the third party's equity interest cannot be guaranteed by the transferring company and the investment must be "at risk" from an investment perspective.[40]

III. ENRON'S USES OF SPEs

A. Background

As Enron grew, it expanded into many areas of business which it had not previously been involved.[41] This growth required large initial capital investments that would be profitable over time, but because of the immediate lack of earnings and cash flow, placed tremendous pressure on Enron's balance sheet.[42] Already facing a large debt load, Enron was unable to finance these investments by issuing additional debt because the lack of cash flow in the short term would be unable

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[37] SFAS 140, *supra* note 34; *see* David A. Kane, *Speech by SEC Staff: Current Accounting Projects Remarks*, (Dec. 4, 2001) (discussing details of accounting for SPE). *See generally* James A. Johnson, *The Accounting Standard Formerly Known as FAS 125*, *in* NEW DEVELOPMENTS IN SECURITIZATION 2000, (PLI Comm. Law and Practice Course, Handbook Series No. A0.004U, 2000) (discussing highlights of accounting rules for SPEs).

[38] SFAS 140, *supra* note 34; *see* Robert Hugi, *United States: Regulatory Update 1998*, MONDAQ BUS. BRIEFING, May 18, 2001, 2001 WL 8986643 (discussing isolation and true sale requirements); *see also* Greg Sigrest & Dayton G. Lierley, *SEC Staff Addresses Current Accounting and Reporting Issues*, BANK ACCT. & FIN., Mar. 22, 2001, 2001 WL 22599891 (noting need for SPE to be demonstrably distinct from transferor).

[39] SFAS 140, *supra* note 34; *see* Johnson, *supra* note 37, at 610-11 (describing equity requirement interest of third party). *See generally* Herdman, *supra* note 12, (discussing technical requirements of SFAS 140).

[40] Herdman, *supra* note 12. .

[41] POWERS REPORT, *supra* note 9, at 36.

[42] POWERS REPORT, *supra* note 9, at 36.

to meet the debt service obligations.[43] Enron did not want to finance the new investments with additional equity issues because of the dilutive effect on earnings per share (EPS), and Enron was a company fixated on driving its share price higher and higher.[44]

Because of these reasons, Enron's corporate finance team began to structure transactions using SPEs that resulted in off-balance sheet treatment.[45] Enron executives preferred the off-balance sheet treatment because they made the balance sheet appear more attractive to investors, analysts and rating agencies.[46] Analysts today have identified over 4,000 SPEs used by Enron to achieve off-balance sheet treatment.[47] Enron used SPEs in virtually every aspect of its business as part of their overall financial strategy and many of the SPEs involved related parties, including Enron's own Chief Financial Officer, Andrew Fastow.[48] In the absence of Chewco, LJM1, LJM2 and other SPEs which served as financing mechanisms which inflated income, hid losses and disguised debt, analysts believe it is very likely Enron lost money in its last five quarters of existence.[49]

This section focuses on three of Enron's largest SPEs–Chewco, LJM1 and LJM2–the structure of the entities,

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[43] POWERS REPORT, *supra* note 9, at 36.

[44] POWERS REPORT, *supra* note 9, at 36. When asked what his number one priority was as Enron'a CEO, Mr. Skilling replied, without hesitation, "to get the stock price up." Eichenwald & Henriques, *supra* note 6, at B1. What made the stock price so important was that Enron was able to obtain financing for the SPEs using its own stock as guarantees, and book profits on the appreciation of the Enron stock held by SPEs. Eichenwald & Henriques, *supra* note 6, at B1.

[45] POWERS REPORT, *supra* note 9, at 37.

[46] POWERS REPORT, *supra* note 9, at 37.

[47] Morgenson, *supra* note 2, at A1. It will likely take a team of forensic accountants years to completely unravel Enron's financial structure. Morgenson, *supra* note 2, at A1.

[48] Robert McCullough, *Understanding LJM*, McCullough Research, Feb. 7, 2002 (on file with author) (noting how SPEs were part of corporate financial structure, possibly foundation); POWERS REPORT, *supra* note 9, at 37 (noting how Enron used SPEs in all aspects of business, from synthetic leases of hard assets to hedging credit risks). "There is a strong impression that Enron's Chief Financial Officer [Fastow] was trying to invent solutions to accounting prohibitions . . . . " McCullough, *supra,* at 1.

[49] McCullough, *supra* note 48, at 3.

the type of transactions Enron used them for, whether or not the requirements to carry them off-balance sheet were met, the effect each had on Enron's overall financial condition and contrast the economic reality of the transactions.

B. Chewco

Enron formed Chewco Investments L.P. in 1997 to purchase the California Public Employees' Retirement System's ("CalPERS") share of a joint venture with Enron.[50] The joint venture was called Joint Energy Development Investment Limited Partnership ("JEDI") and Enron, the general partner, had contributed $250 million in stock, while CalPERS, the limited partner, had contributed $250 million in cash to the original capitalization of JEDI.[51] Chewco was the first time Enron used an SPE, controlled by an Enron employee, to keep a significant investment off Enron's consolidated financial statements.[52] Chewco would serve as a prologue to later SPE transactions.

The purpose of Chewco, ironically, was to maintain JEDI as an unconsolidated entity.[53] Chewco purchased CalPERS JEDI interest for $383 million.[54] In order to finance the purchase, Chewco borrowed money on an unsecured basis while Enron guaranteed the loans.[55] Enron was able, since Chewco was a partner in the JEDI venture, to accelerate revenue recognition on the JEDI venture.[56] The JEDI venture was required to pay Enron annual management fees, which allowed Enron to recognize income of $25.7 million in 1998.[57] Furthermore, because JEDI used the equity method of ac-

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[50] POWERS REPORT, *supra* note 9, at 43.

[51] POWERS REPORT, *supra* note 9, at 43.

[52] POWERS REPORT, *supra* note 9, at 42. *See generally* E.S. Browning & Jonathon Weil, *Corporate Veil: Behind Enron's Fall: A Culture of Operating Outside Public View–Hidden Deals with Officers and Minimal Disclosure Finally Cost It Its Trust–Chewco and Jedi Warriors*, WALL ST. J., Dec. 5, 2001, at B1 (discussing in-depth details of Chewco's formation, structure, and transactions).

[53] POWERS REPORT, *supra* note 9, at 43.

[54] POWERS REPORT, *supra* note 9, at 44.

[55] POWERS REPORT, *supra* note 9, at 45.

[56] POWERS REPORT, *supra* note 9, at 56.

[57] POWERS REPORT, *supra* note 9, at 57-58.

counting, thereby carrying assets at fair value, Enron was able to record as income appreciation in their own stock, in one quarter alone recognizing revenues of $126 million in 2000.[58] One can easily see how Enron used Chewco as a limited partner in a joint venture to artificially inflate revenues.

From the outset, Chewco did not meet the requirements to remain an unconsolidated SPE. Michael Kopper, an Enron employee under the CFO Fastow's direct supervision, was the general manager of Chewco with complete control over Chewco's actions.[59] While the assessment of control is highly subjective under the current accounting rules, a conclusion about whether Enron imputedly controlled Chewco does not have to be reached.[60] Chewco failed the equity requirement for a non-consolidated entity because it lacked sufficient outside equity.[61]

In order to meet the requirements to be carried off-balance sheet, Chewco was required to have a minimum of 3% equity at risk provided by outside investors. But Enron and Chewco could not find enough willing third party investors, even after preparing a private placement memorandum.[62] Therefore, Fastow and Kopper tried to create an elaborate finance structure which gave the appearance that the 3% outside equity requirement had been met, but even then, Chewco was 50% short of the required third party equity.[63] However, Enron still accounted for Chewco as an unconsolidated SPE from March of 1997 through March of 2001.[64]

When Enron was finally forced to consolidate Chewco onto

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[58] POWERS REPORT, *supra* note 9, at 2-3.

[59] *Id.* at 18-24. Koppler made profits of over $10 million in his Chewco investment. Eichenwald & Henriques, *supra* note 14, at A1. The Powers Report notes that it failed to determine why Enron used a financing structure which from the outset clearly did not meet the requirements to be carried off-balance sheet. POWERS REPORT, *supra* note 9, at 54.

[60] For a discussion of Koppler's control in Chewco and whether such control should be imputed to Enron, see POWERS REPORT, *supra* note 9, at 45.

[61] POWERS REPORT, *supra* note 9, at 52.

[62] POWERS REPORT, *supra* note 9, at 41-42, 49.

[63] POWERS REPORT, *supra* note 9, at 41-42, 49 (discussing financing structure which involved three layers of funding).

[64] POWERS REPORT, *supra* note 9, at 42.

its financial consolidated financial statements, the retroactive consolidation had a dramatic effect.[65] It decreased net income by a total of $405 million over four years, 15% of total income for the four years.[66] Enron's reported debt load also increased by $711 million in 1997, $561 million in 1998, $685 million in 1999, and $628 million in 2000 due to the consolidation.[67] The retroactive restatement of the debt load is a perfect example of the amount of debt Enron was able to hide from analysts, while the reduction of income shows how Enron used SPEs to artificially inflate income.

Chewco gives one a good indication of the misleading effect SPEs had on key financial rations and conditions at Enron. Through Chewco, Enron was able to recognize as income the appreciation of its own stock, record as income management fees attributable to the administrative expenses of Chewco, and hide a large amount of debt. In reality, Chewco had very little business purpose and even less economic merit.

C. LJM1

In June 1999 Fastow, Enron's CFO, created LJM Cayman ("LJM1").[68] Fastow was the general partner with CSFB and NatWest as limited partners.[69] Fastow contributed $1 million in return for a 6% interest, while the limited partners contributed $15 million for the remaining 94%.[70] As is evident in the following discussion, it is without question that the purpose of the SPE was to conduct transactions with Enron off Enron's financial statements.

LJM1 engaged in three transactions with Enron: (1) LJM1 purchased a portion of Enron's interest in Cuiaba, a Brazilian power project, (2) an attempt by Enron to hedge its position in Rhythms NetConnections ("Rhythms") stock and (3) a purchase by LJM1 of an equity interest in "Osprey," another

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[65] POWERS REPORT, *supra* note 9, at 42.
[66] POWERS REPORT, *supra* note 9, at 42.
[67] POWERS REPORT, *supra* note 9, at 42.
[68] POWERS REPORT, *supra* note 9, at 68-69.
[69] POWERS REPORT, *supra* note 9, at 68-69.
[70] POWERS REPORT, *supra* note 9, at 68-69.

Enron SPE.[71]

Enron used the Cuiaba purchase to inflate earnings by $65 million.[72] LJM1 purchased Enron's Cuiaba interest, allowing Enron to deconsolidate the natural gas supply arrangements.[73] Then Enron was able, using the controversial mark to market method of accounting, to recognize earnings of $65 million for sales of natural gas to Cuiaba.[74] After Enron recognized the earnings, it repurchased Cuiaba from LJM1.[75]

Even the most discerning of investors would not have been able to decipher where these earnings came from.[76] The 1998 10-K indicated Enron owned a 65% direct ownership interest while subsequent reports footnote that Enron owned "varying" interests in the projects.[77]

Enron attempted to hedge its investment in Rhythms' stock by transferring to LJM Swap Sub (Swap Sub), a LJM1 subsidiary, restricted Enron shares for a note from LJM1.[78] Swap Sub would reimburse Enron if Rhythms stock price fell. However, as the Powers Report points out, the transaction was not a true hedge because it depended on the value of

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[71] POWERS REPORT, *supra* note 9, at 70.

[72] McCullough, *supra* note 48, at 4.

[73] McCullough, *supra* note 48, at 4.

[74] McCullough, *supra* note 48, at 4. Mark to market accounting allows a company to estimate the value of multi-year tranactions and book the potential cash flow stream immediately. McCullough, *supra* note 48, at 4. Mark to market accounting can more accurately reflect earnings over a period of time, so long as the model used to formulate the predictions is correctly constructed. Kurt Eichenwald, *Through the Enron Looking Glass*, N.Y. TIMES, Feb. 17, 2002, at B1. Accounting experts question the models used by Enron to formulate the fair value of the earnings, especially in the Cuiaba transaction, noting that future estimates of natural gas prices are especially speculative. Richard McCullough, *Deconstructing Enron's Collapse*, McCullough Research, Jan. 10, 2002, at 6. Furthermore, marking to market long-term contracts without a benchmark, i.e. when no real market exists to evaluate the transaction, leads to booking income from deals that is largely illegitimate and speculative. Eichenwald, *supra*, at A1. For a discussion of the other downfalls of mark to market accounting, see McCullough, *supra* note 48, at 4.

[75] McCullough, *supra* note 48, at 4.

[76] McCullough, *supra* note 48, at 4.

[77] ENRON, 1999 ANNUAL REPORT, Form 8-K (making no mention of any ownership interest in Cuiaba).

[78] POWERS REPORT, *supra* note 9, at 79-82.

Enron's stock–Swap Sub would not be able to perform on its note if Enron's share price fell.[79]

The purpose of the transaction was two fold. First, Enron was concerned about the volatility of Rhythms stock because it was accounted for at market value and increases and decreases flowed through to Enron's income statement.[80] Enron was also prohibited by a lock-up agreement from selling the stock until the beginning of 2000. [81]Wanting to capture the appreciation on the Rhythms stock and protect against volatility, Enron needed to hedge its position.[82]

Secondly, Enron wanted to capitalize on the increases in value of its own stock. It had a series of forward contracts with investment banks permitting it to buy its own stock at a future date.[83] Under GAAP, a company is prohibited from recognizing the increases in value of futures contracts on its own stock as income.[84] Trying to capture the income "embedded" in the futures contracts, because Enron's share price at the time was substantially higher than the strike price, and trying to hedge the Rhythms' position, Enron engaged with LJM1 the swap of stock for a note.[85]

This transaction allowed Enron to obtain a hedge otherwise which would have been commercially unavailable while speculating in the value of its own stock.[86] This transaction raises accounting and legal issues by allowing a company to use an SPE as counter-party in a hedging transaction. Without this transaction, Enron's net income would have been reduced by $95 million in 1999 and $8 million in 2000 due to decreases in Rhythms stock and the failure to capture the income "embedded" in the futures contracts.[87]

The third transaction involved LJM1 purchasing an equi-

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[79] POWERS REPORT, *supra* note 9, at 79-82.
[80] POWERS REPORT, *supra* note 9, at 79-82.
[81] POWERS REPORT, *supra* note 9, at 79-82.
[82] POWERS REPORT, *supra* note 9, at 79-82.
[83] POWERS REPORT, *supra* note 9, at 79-82.
[84] POWERS REPORT, *supra* note 9, at 79-82.
[85] POWERS REPORT, *supra* note 9, at 79-82.
[86] POWERS REPORT, *supra* note 9, at 79-82.
[87] McCullough, *supra* note 48, at 7-8.

ty investment in "Osprey," another Enron SPE, to provide the requisite outside equity interest needed to qualify as a non-consolidated entity.[88] While the details of Osprey's transactions are somewhat unclear at the time of writing, this much is known. Enron originally contributed $2.4 billion in stock to Whitewing, a SPE of Osprey, backed by a guarantee from Enron.[89] Once Enron declared bankruptcy, logically the stock price fell to zero and therefore Enron was liable to other Whitewing third party investors for the guarantee.[90] Because of other financing arrangements, the total amount of the guarantee is now valued at $700 million.[91] This $700 million has not yet been included, as of the time of writing, in any of Enron's restatements of liabilities.[92] The Powers Report was unable to diagnose the overall effect of the Osprey and Whitewing SPEs, which in effect were SPEs of LJM1, but it appears the intended goal was for Enron to be able to offset losses in assets with future appreciation in Enron stock.[93]

D. LJM2

No other Enron SPE is as egregious as LJM2 because it illustrates how a SPE can be properly structured to meet both the accounting requirements for non-consolidation and legal requirements for minimal disclosure and yet add such puffery to the company's financial statements. LJM2 was formed by at least fifty outside third parties, including entities associated with J.P. Morgan, Merrill Lynch, Citicorp, First Union, and G.E. Capital, and the general partner, LJM Capital Management, i.e. Fastow.[94] The outside investors contributed at least $200 million of the total $394 million capitalization of LJM2.[95]

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[88] POWERS REPORT, *supra* note 9, at 70.

[89] McCullough, *supra* note 48, at 7-10.

[90] McCullough, *supra* note 48, at 7-10.

[91] McCullough, *Understanding Whitewing*, McCullough Research, Jan. 22, 2002, at 5-6 (on file with author).

[92] *Id.*

[93] *Id.*

[94] POWERS REPORT, *supra* note 9, at 73.

[95] POWERS REPORT, *supra* note 9, at 71-73. The outside equity requirement for

LJM2 offered partnership investors outrageous returns–"193%, 278%, 2500%"–and gave partnership investors access to more financial information than shareholders were given.[96] LJM2 investors were aware that Enron controlled 50% more assets than what was reported in the audited consolidated financial statements, details of off balance sheet transactions that shareholders were unaware of and were told that LJM2 expected "to benefit from having the opportunity to invest in Enron generated investment opportunities that would not be available otherwise to outside investors."[97] The returns to LJM2 were not the result of a large risk taken, but because LJM2 essentially lent its name to structures which allowed Enron to "circumvent accounting convention" and create an illusory picture of earnings.[98]

LJM2 engaged in a wide variety of transactions with Enron, including attempts by Enron to hedge against investment assets and LJM2 purchases of Enron assets. The purchase of LJM2 of Nowa Sarzyna, a Polish power plant whose value was guaranteed by Enron stock, illustrates how Enron used SPEs to move assets through "independent entities" to add earnings to the income statement.[99] After LJM2 bought the power plant, it sold it to Whitewing, another Enron SPE. LJM2 received a 25% return on the sale to Whitewing while Enron booked $16 million in income on the sale to LJM2.[100] In essence, LJM2 received a large return for acting as a conduit for an asset moved to Whitewing so Enron could recognize income.[101] Because the plant's value was guaranteed by

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non-consolidation, 3%, was obviously met.

[96] POWERS REPORT, *supra* note 9, at 128. For a rather condemning look on how securities lawyers feel about how LJM2 was structured and the information provided to investors, see Henriques & Eichenwald, *supra* note 12, at A1 (shocking, horrified and indefensible amongst words used). *See generally* McCullough, *supra* note 48 at 6-10 (discussing value of information provided to potential investors and graph of structure).

[97] POWERS REPORT, *supra* note 9, at 72; Henriques & Eichenwald, *supra* note 12, at A1; McCullough, *supra* note 48, at 5.

[98] POWERS REPORT, *supra* note 9, at 129.

[99] McCullough, *supra* note 48, at 12.

[100] McCullough, *supra* note 48, at 12.

[101] McCullough, *supra* note 48, at 12.

Enron's stock, the only economic purpose of the transaction was to allow Enron to book income.[102]

The transactions having the greatest effect on Enron's financial statements between Enron and LJM2 involved the now infamous "Raptor" SPEs that were spun off from LJM2.[103] The Raptors were formed to hedge against the future volatility of Enron's large technology portfolio and were an attempt to use appreciation in Enron's own stock to avoid losses in these investments. Enron was accounting for these technology investments at market value and wanted to remove the potential volatile effect on income off the financial statements.[104]

Enron entered into derivative hedging transactions with the Raptors by transferring technology investment assets to the Raptors along with its own stock at a discounted price.[105] Forecasted appreciation in Enron's stock would offset losses in the investment assets–in effect, declines would be offset by increases in the value of the hedge to Enron.[106]

The Powers Report points out that these transactions were not true economic hedges.[107] Enron bore all of the risk of the transaction–it was simply hedging with itself.[108] The ability to hedge was dependent upon the price of Enron's stock and if Enron's stock fell at the same time the investment assets decreased, the Raptors would be unable to honor the "hedge."[109]

Use of the Raptors allowed Enron to avoid booking over $1 billion in losses from declines in technology invest-

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[102] McCullough, *supra* note 48, at 12.

[103] POWERS REPORT, *supra* note 9, at 97.

[104] POWERS REPORT, *supra* note 9, at 97-99. Because Enron accounted for these investments at market value, the changes in value flowed through to Enron's income statement. Skilling, afraid of potential volatility, wanted to transfer this risk to another entity. POWERS REPORT, *supra* note 9, at 97-99.

[105] POWERS REPORT, *supra* note 9, at 97-98.

[106] POWERS REPORT, *supra* note 9, at 97-98.

[107] POWERS REPORT, *supra* note 9, at 97.

[108] POWERS REPORT, *supra* note 9, at 97.

[109] POWERS REPORT, *supra* note 9, at 97.

ments.[110] From the following table,[111] one can see that Enron's profits, as reported in the consolidated financial statements were mostly fiction—fiction written by complicated sets of transactions involving sophisticated hedges and derivative transactions:

[110] POWERS REPORT, *supra* note 9, at 132.
[111] POWERS REPORT, *supra* note 9, at 133.

(Table in Millions)

PERIOD	EARNINGS	RAPTORS CONTRIBUTION TO EARNINGS	EARNINGS WITHOUT RAPTORS
3Q 2000	$ 364	$ 69	$ 295
4Q 2000	$ 286	$ 462	($ 176)
1Q 2001	$ 536	$ 255	$ 281
2Q 2001	$ 530	$ 40	$ 490
3Q 2001	($ 210)	$ 251	($ 461)
TOTAL	$1,506	$1,077	$ 429

One analyst, in conducting an analysis of LJM2 and its importance to Enron, pointed out that the size, complexity, creativity and ingenuity of LJM2's structure indicates just how important it was to Enron's overall corporate health.[112] Furthermore, as evidenced by the above table, one can see how misleading this health was, and how that lie was perpetuated by Enron executives and their uses of SPEs.

E. Control Issues

While LJM1 and LJM2 both met the technical requirements of 3% outside equity being at risk, there is significant doubt as to whether either entity was in fact controlled by an independent third party who had substantial equity as well as the risk and rewards of ownership as required by the accounting rules. If Andrew Fastow had "control" of the partnerships, then arguably, the SPEs never qualified for non-consolidation.

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[112] McCullough, *supra* note 48, at 6.

The Powers Report exhaustively reviewed whether, under current accounting requirements, Fastow controlled LJM1 and LJM2 and concluded that, given the current knowledge of both partnerships, "arguments could be made both for and against consolidation based on Fastow's control of the partnerships."[113] Fastow, Enron's Chief Financial Officer, was allowed to be a managing partner in the limited partnerships Enron spun-off, thereby putting himself in the position to negotiate deals for the partnerships across the table from his subordinates, who were negotiating on behalf of Enron.[114]

However, analysts point out that the "raison d'être" of both LJM1 and LJM2 was that the CFO, a senior executive, would be positioned to move Enron assets, with the assistance of outside equity, to satisfy the financing needs of Enron.[115] Without Fastow's control and direction, LJM's deals with Enron would not have occurred.[116] As analysts note, the absence of an arm's length relationship was the very reason the partnerships were successful, as evidenced by the statement in LJM2's offering document that it expected to benefit from opportunities not available to outside investors and Fastow's access to Enron's information would result in "superior returns."[117] For these reasons, one can make a strong case, based on Fastow's control, that the entities never met the requirements for non-consolidation.

F. What Did Enron Disclose About the SPEs?

Enron was required to disclose and describe "related-party transactions" in both the annual proxy statements and the periodic reports filed with the SEC.[118] The Powers Report

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[113] POWERS REPORT, *supra* note 9, at 76.

[114] POWERS REPORT, *supra* note 9, at 75-76.

[115] McCullough, *supra* note 48, at 5.

[116] McCullough, *supra* note 48, at 5.

[117] McCullough, *supra* note 48, at 5 (discussing how absence of arm's length relationship contributed to partnership returns); POWERS REPORT, *supra* note 9, at 151 (noting how LJM2 would profit from Fastow's involvement).

[118] 17 C.F.R. § 229.404 (1999). Item 404 requires disclosure of related-party transactions exceeding $60,000 if a senior executive has a material interest in the transaction. *Id.* Item 404 also requires that the nature and amount of the executive's interest be described when practicable as well as the total amount of

found inadequacies in several specific disclosures, but more importantly, concluded that Enron failed to disclose to shareholders and investors "facts that were important for an understanding of the transactions."[119]

Enron's annual proxy reports to shareholders describes LJM1 and LJM2 (LJMs) as a "private investment company that primarily engages in acquiring or investing in energy and communications investments."[120] Enron discloses in the proxy that Fastow could potentially receive a portion of the profits greater than his original contribution, but fails to give any specifics, including the amounts Fastow had already been compensated.[121]

The omission of the outrageous profits received by Fastow, which totaled over $30 million, came by way of a great deal of legal gymnastics to circumvent the rule of Item 404 of Regulation S-K which requires disclosure of such amounts "when practicable."[122] Without detailing the irrational rational used by Enron's lawyers to reach a conclusion, Enron decided such disclosure was "not practicable."[123]

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the transaction. *Id.*

[119] POWERS REPORT, *supra* note 9, at 178. Companies are required, by Item 303(a) of Regulation S-K, in the Management Discussion & Analysis (MD&A) section of the consolidated financial statements to provide information what is necessary for an overall understanding of the company's financial condition and results of operations. Concept Release on Management's Discussion & Analysis of Financial Condition and Results of Operations, Securities Act Release No. 6711 52 Fed. Reg. 13715 (April 17, 1987). The MD&A disclosures about related-party transactions are designed to provide investors with "historical and prospective textual disclosures," which enables investors to assess a company's future prospects., Management's Discussion & Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, 54 Fed. Reg. 22427, 22438 (May 18, 1989).

The SEC, just recently has taken a new approach in stating that corporations can comply with GAAP and still violate SEC laws. Steve Liesman, *SEC Accounting Cop's Warning: Playing by the Rules May Not Ward Off Fraud Issues*, WALL ST. J., Feb. 12, 2002, at C1 A company may be found guilty of fraud if financial statements do not accur. ·r reflect the underlying economic condition of its businesses. *Id.* This approach requires a company to comply with GAAP and fairly present financial performance. *Id.*

[120] ENRON, PROXY STATEMENT FOR SHAREHOLDERS (2000 & 2001).

[121] POWERS REPORT, *supra* note 9, at 185-86.

[122] POWERS REPORT, *supra* note 9, at 187-89.

[123] POWERS REPORT, *supra* note 9, at 188-89.

The proxy statements also went to great lengths to assure readers that the transactions with the LJMs were conducted at arm's-length and that no more favorable terms were reached than what would have been reached on the open market.[124]

In describing the Rhythms hedging transaction, Enron disclosed the details but failed to articulate the business purpose or economic merits underlying the transaction.[125] While discussing that LJMs had acquired debt and equity in other Enron subsidiaries, Enron did not disclose specific amounts, rather aggregated amounts of the underlying transactions.[126]

The proxy statements also disclosed that LJM2 had purchased Enron assets that Enron had sold to limit exposure to future price volatility.[127] Again Enron disclosed the aggregate consideration paid, but not the specific amounts for each transaction, nor the specific assets sold.[128] For example, Enron disclosed that LJM2 had paid Enron $213 million in asset acquisitions and Enron had paid LJM2 $76 million for a merchant investment asset.[129] But Enron failed to disclose that the $76 million purchase was an asset buy-back that Enron had originally sold to LJM2.[130]

Enron disclosed that it conducted transactions with LJM2 intended to "manage price and value risk" by entering into derivative transactions.[131] Enron referred to four structured finance vehicles, what we know as the Raptors, that LJM2 had equity interests in whom Enron had also contributed stock and assets.[132] Enron disclosed that it entered into derivative transactions with these entities with a "combined notional amount of $1.2 billion."[133] What Enron fails to disclose is that the Raptors distributed $82 million to LJM2 be-

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[124] POWERS REPORT, *supra* note 9, at 191-92.
[125] POWERS REPORT, *supra* note 9, at 194-95.
[126] POWERS REPORT, *supra* note 9, at 194-95.
[127] POWERS REPORT, *supra* note 9, at 185-86.
[128] POWERS REPORT, *supra* note 9, at 185-86.
[129] POWERS REPORT, *supra* note 9, at 186.
[130] POWERS REPORT, *supra* note 9, at 192.
[131] POWERS REPORT, *supra* note 9, at 186.
[132] POWERS REPORT, *supra* note 9, at 192.
[133] POWERS REPORT, *supra* note 9, at 186.

fore the derivative contracts were initiated.[134] The Powers Report notes how critical this fact is to assessing the overall fairness of the transaction.[135]

While acknowledging that the proxy statement disclosures were, for the most part, factually correct, the Powers Report stresses that the disclosures failed to convey a proper understanding of the nature and significance of the partnership transactions.[136] Essentially the purpose of the proxy statements, to inform shareholders about significant company transactions and the overall financial condition, was lost.[137]

Beginning in the second quarter of 1999, Enron included a section in the footnotes to the financial statements entitled "Related Party Transactions."[138] The footnote included information about the structure of the LJMs, various assertions that the transactions were conducted at arm's-length and descriptions of the transactions.[139]

The footnote mentioned, without naming, that a senior executive at Enron was in fact the managing member of the general partner of the LJMs.[140] And, after the second quarter of 2000, the footnotes refer only to the LJMs as "Related Parties," without ever mentioning their name.[141]

The footnotes contained many more details than the proxy statements about the transactions between Enron and the LJMs.[142] However, the details were similar to the proxy statements in one regard: they both failed to communicate to a reader the significance and nature of the transactions.[143] The

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[134] POWERS REPORT, *supra* note 9, at 192.
[135] POWERS REPORT, *supra* note 9, at 192.
[136] POWERS REPORT, *supra* note 9, at 187-89.
[137] POWERS REPORT, *supra* note 9, at 187-89.
[138] POWERS REPORT, *supra* note 9, at 192.
[139] POWERS REPORT, *supra* note 9, at 193, 194-95.
[140] POWERS REPORT, *supra* note 9, at 193.
[141] POWERS REPORT, *supra* note 9, at 193.
[142] POWERS REPORT, *supra* note 9, at 194-95.
[143] Item 303(a) of Regulation S-K requires that a company's reliance on off-balance sheet financing be discussed fully, including the financing, liquidity, hedging and leasing conducted through the SPE. Management's Discussion & Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6835, 54 Fed. Reg. 22427, at III.C (May 18, 1989). Included in this discussion should be information which describes the

Powers Report points out the information disclosed failed to convey a proper understanding of the transactions are required by current disclosure rules.[144]

The Powers Report found two problems with the footnote disclosures.[145] First, Enron made repeated unsubstantiated assertions that the transactions conducted with the LJMs were done at arm's-length and that no more favorable terms were reached than what could've been reached on the open market.[146] However, transactions with related parties, under current accounting standards, cannot be presumed to be made at arm's-length and disclosures about them cannot imply such.[147] Furthermore, the terms of the deals could only have been reached between related parties.[148]

Second, the footnote disclosures failed to disclose important details of transactions with the LJMs. For example, like the failure in the proxy statements, Enron failed to mention that assets sold to LJM2 were often repurchased within a matter of months.[149] Furthermore, while disclosing certain risk management moves, Enron failed to disclose it had purchased puts on its own stock and that it was essentially hedging with itself.[150] Certainly shareholders and investors would want to be aware that Enron executives were entering into transactions on behalf of the company on the assumption Enron's share price would fall.

The Powers Report makes several important conclusions

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business purpose and activities of the SPE, material terms of transactions, and the potential risk exposure of the company. *Id.* In a recent statement regarding SPEs and their disclosure in the MD&A section of the financial statements, the SEC noted that disclosure should describe the nature and risks of the transactions rather than just reciting boilerplate language of the terms of the transactions. Securities Act Release No. 8056, 45321 (Jan. 22, 2002) Commission Statement About MD&A of Financial Condition and Results of Operations, 2002 WL 77153, at 5.

[144] POWERS REPORT, *supra* note 9, at 200-03; *See* SFAS No. 57 for the rules concerning disclosure of related party transactions.

[145] POWERS REPORT, *supra* note 9, at 197-200.

[146] POWERS REPORT, *supra* note 9, at 198-99.

[147] POWERS REPORT, *supra* note 9, at 198-99.

[148] POWERS REPORT, *supra* note 9, at 198-99.

[149] POWERS REPORT, *supra* note 9, at 199-200.

[150] POWERS REPORT, *supra* note 9, at 199-200.

regarding Enron's overall disclosure, but none more important than Enron disclosed information in a way to minimize outsiders knowledge and understanding of the actual financial condition of the company.[151] This minimization led to investor confusion and ignorance.

IV. WHERE TO GO FROM HERE?

Since Enron rudely introduced SPEs and off-balance sheet partnerships to the world at large, many groups are clamoring for new accounting and disclosure requirements which would prevent companies from being able to use SPEs as hideaways.[152] Enron's use of SPEs has shaken investor confidence and caused other companies who have off-balance sheet partnerships shares to plummet.[153] Furthermore, while some

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[151] POWERS REPORT, *supra* note 9, at 199-200. Clearly the way in which Enron disclosed information failed to convey to investors and overall understanding of the SPE transactions, violating Item 303 and Item 404 of Regulation S-K.

[152] Floyd Norris & Joseph Kahn, *Rule Makers Take on Loopholes That Enron Used in Hiding Debt*, N.Y. TIMES, Feb. 14, 2002, at A1 (discussing how regulators, lawmakers, legislators and accountants plan to force companies to include in their financial statements results of off-balance sheet partnerships). *But cf.* Robert L. Bartley, *Thinking Things Over: Enron: First, Apply the Law*, WALL ST. J., Feb. 11, 2002, at A23 (noting that current laws may be adequate to address problems and often market's own punishment is effective deterrent). "So despite all the arm-waving, it might be a good idea to let the law take its course before throwing the free-market baby out with the Enron bathwater." *Id. See generally* Burton Malkiel, *Watchdogs and Lapdogs*, WALL ST. J., Jan. 16, 2002, at A16 (noting that root problem-series of conflicts of interests within financial system must be addressed).

[153] *Big 5, AICPA and SEC Act on Disclosure in Wake of Enron Fiasco*, Jan. 1, 2002, FIN. ANALYSIS, PLANNING & REP., 2002 WL 7329706. As investors have become more skeptical of companies financial statements, in light of Enron, share prices have been hard hit. E.S. Browning & Jonathan Weil, *Burden of Doubt: Stocks Take a Beating as Accounting Worries Spread Beyond Enron*, WALL ST. J., Jan. 30, 2002, at A1 (discussing companies whose share price has fallen on accounting worries); *see* Cassell Bryan-Low, *Analyst Lowers Rating on Shares of Sunrise Over General Skittishness About Accounting*, WALL ST. J., Feb. 15, 2002, at C2 (discussing impact of use of SPEs on one company's share price). *But see* Thomas S. Mulligan, *The Fall of Enron–Companies Simplifying Accounting-Complex Methods Lose Favor as Firms Scurry to Prove Worth*, HOUSTON CHRON., Feb. 19, 2002, at 7 (noting how companies are changing accounting and disclosure policies to espouse message that "we are not Enron"). Some believe that, because of Enron, a "premium will attach to companies" with simple corporate finance structures. *Id.*

of Enron's disclosures kept with the technical requirements of disclosure, as a whole Enron's disclosures undermined the spirit of the regulations by failing to convey to investors a sense of how the partnerships were really used.[154]

So the question becomes how can we prevent future Enrons?[155] More importantly in regards to SPEs, how can accounting and disclosure rules be re-drafted to address the particularly egregious uses of SPEs, illustrated by LJM2? Current accounting proposals are centered around increasing the floor for independent equity at risk, from 3% to 10%, to meet the requirements to be kept off-balance sheet.[156] Current disclosure proposals call for companies to identify their critical accounting policies upon which their financial statements are drafted and for meaningful information as to the differing applications of these principles.[157]

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[154] Henriques & Eichenwald, *supra* note 12, at A1. "Clearly it violates the spirit and intent of securities laws and the whole concept of full and fair disclosure." Henriques & Eichenwald, *supra* note 12, at A1. (*quoting* Richard C. Breeden, former SEC chairman). Contrast Enron's method of disclosure with the primary goal of federal securities laws which is to promote honest and efficient markets combined with ensuring investors are able to make informed decisions. Herdman, *supra* note 12.

[155] Pitt, *supra* note 12, at A18. Former SEC Chairman Harvey Pitt proposed a five point plan to improve the current system of disclosure. Pitt, *supra* note 12, at A18. His plan includes a system of real-time disclosure, disclosure of trend and evaluative data, more easily interpreted financial statements, disclosure of critical accounting policies and more responsive private-sector standard setting bodies. Pitt, *supra* note 12, at A18. But see Steve Liesman et al., *Dirty Books? Accounting Debacles Spark Calls for Change*, WALL ST. J., Feb. 6, 2002, at A1 for a sharp critique of Pitt's new proposed plan. Many critics are calling for much more dramatic changes. *Id.*

[156] Norris & Kahn, *supra* note 152, at B1; *see* Kip Betz, *Consolidations: FASB Sets Approach for Situations Related to Special-Purpose Entities*, SEC. REG. L.J., Feb. 18, 2002 (discussing how FASB plans to approach accounting standards for SPEs); *see also* Steve Liesman, *FASB Seeks to Toughen Up Its Approach to Off-Book Debts*, WALL ST. J., Feb. 14, 2002, at C1 (discussing new rules which tighten standards for when SPEs can be carried off-balance sheet). These new requirements would require hundreds of publicly traded companies to add billions in debt to their balance sheets. Kathleen Day, *Enron Inspires Accounting Changes*, WASH. POST, Feb. 28, 2002, at E1.

[157] Norris & Kahn, *supra* note 152, at B1; *see* Pitt, *supra* note 12, at A18 (discussing new approaches to disclosure); *see also Enron Fallout: New Rules From FASB and SEC Will Target Disclosure and SPEs*, FIN. ANALYSIS, PLANNING & REP., Mar. 1, 2002, 2002 WL 7329718 (discussing new rules for corporate re-

However, these new proposals fail to address the most problematic issues: who effectively controls the SPE and how can investors be made aware of the amount of risk exposure a company has in relation to the SPE? As the Powers Report points out, current accounting standards inadequately address the control issue.[158] Under the current rules, control is determined by examining both the relative rights of investors and the ability to control day-to-day operations, guidelines similar to other partnership control determinations.[159] Current disclosure rules rely on the relatively soft standard that a company must disclose information in a way that conveys to investors an overall understanding of a company's financial condition. Such a standard is inherently subjective and very difficult to enforce.

Furthermore, the disclosure standards for related-party transactions also fail to relay to investors that a company is transacting with another entity which it "effectively controls." Effective control is used in the context that while it is always possible to draft documents and terms that facially put control in the hands of one party, in reality control lies with another party. New accounting and disclosure rules must look beyond the face of documents and form of SPE transactions and examine the heart and substance of SPE transactions.

New rules should be drafted with the age-old tax adage in mind: substance over form. With most of Enron's SPEs, there was no reason for the entities to exist outside of Enron's ability to effectively control their activities.[160] Enron did this, rather blatantly, by allowing a senior executive to be the managing partner for several of the SPEs. While the form of the transactions met the technical requirements, the substance was Enron was creating entities that allowed it to manipulate its financial statements. In cases of other companies, one must wonder whether a company would create an SPE in the absence of being able to "effectively control" the entity?

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porting and disclosure to combat fallout from Enron).

[158] POWERS REPORT, *supra* note 9, at 47-49.

[159] POWERS REPORT, *supra* note 9, at 48.

[160] *See supra* notes 59, 68, 69, 70, 94, 115, 116, 117 and accompanying text.

One suggestion for a new rule in accounting and disclosing SPEs is to require a company to disclose a second set of consolidated financial statements which include the consolidated effects of SPEs which the company "effectively controls." Of course, the problem with the term of art, "effective control," is that some may argue it injects more ambiguity into an already byzantatine structure of accounting and disclosing SPEs. But very similar to another widely used term of art, "materiality," standards can be formed to define the parameters of the terms meaning. Much like materiality is often thought of as information that would make a difference in the mind of a reasonable investor, such a standard can be formed for "effective control." One standard is whether there exists a legitimate business purpose or economic merit to the entity outside of the business purposes of the sponsoring company. In other words, is there a legitimate business purpose to the SPE other than to remove certain assets and liabilities off-balance sheet?

In conjunction with the "effective control" standard, one would also want companies to better delineate in their disclosures the aggregate amounts at risk, not only through equity investments but guarantees in stock and assets as well.

This different theoretical framework for disclosure and consolidation obviously would force companies to rethink their uses of SPEs. Under the framework, Enron would have had to disclose a second set of consolidated statements showing the effects of all three partnerships discussed in this article, Chewco, LJM1 and LJM2. Enron also would have been forced to disclose the amounts it had guaranteed to the partnerships and other SPEs in the form of stock guarantees. For example, in one power plant transaction with an SPE, Enron guaranteed the value of the plant with stock, and certainly investors would want to be aware of this information.[161]

Disclosure requirements and accounting rules must be rethought so as to more accurately reflect a company's real financial condition and should be redrafted with the objective to create a system of information that is both understandable

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[161] *See supra* note 117 and accompanying text.

and meaningful.[162] No system will ever be foolproof or perfect,[163] and those bent upon manipulation, like Enron, may be able to create structures and devices that circumvent understanding. But this much is clear: there is a better way than the current rules to address the widespread use of special-purpose entities and regulators and lawmakers alike must, in the coming months, formulate a better approach to SPEs to ensure the efficiency and success of America's, and in turn the world's, capital markets.

Hunter Carpenter[164]

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[162] Pitt, *supra* note 12, at A18.

[163] Pitt, *supra* note 12, at A18.

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The Gramm-Leach-Bliley Financial Modernization Act—Analysis and Suggestions for Reform

I. INTRODUCTION

The Gramm-Leach-Bliley Financial Modernization Act (GLBA) was enacted into law on November 12, 1999.[1] Portions of the GLBA impose restrictions on how financial institutions may share nonpublic personal information with third parties and require financial institutions to notify all customers of their privacy policy with respect to such disclosures.[2] Congress' mandates, as set forth in the GLBA, are predominantly effectuated by regulations promulgated by the Federal Trade Commission.[3] While the regulations implementing the GLBA do offer some highly technical guidance to practitioners, the Act falls short of absolute clarity.[4] Particularly unclear is the scope of the Act, the various exceptions to the privacy requirements and the intention of the Act not to preempt state law.[5] Currently, the Act's applicability in specific arenas, including the legal profession, remains unclear.[6] Part II of this

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[1] Pub. L. No. 102-106 (1999). Title V of the GLBA establishes a comprehensive list of financial privacy requirements, designed to protect consumers' privacy.

[2] 15 U.S.C. § 6801 et seq. (2000). The Act states that it is Congress' policy that each financial institution has an "affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of nonpublic personal information." *Id.* For a succinct analysis of the regulations implementing the GLBA see L. Richard Fischer, *The Gramm-Leach-Bliley Act and Its Implementation*, SG066 ALI-ABA 65 (2002).

[3] *See* 16 C.F.R. § 313.1 et seq. (2002) The Rules promulgated by the FTC both implement the GLBA and provide those subjected to the Act with sample compliance privacy notes. *See also* 16 C.F.R. § 313.18 (2002).

[4] The Act demanded full compliance by financial institutions by July 1, 2001. 65 Fed. Reg. 33646 (May 24, 2000).

[5] *See* 16 C.F.R. §§ 313.13 (detailing exceptions in instances of joint marketing) and 313.14 (listing opt-out exceptions where disclosure necessary to perform transaction).

[6] While the GLBA states that it applies merely to "financial institutions" and proceeds to define the term, there exists considerable difficulty in determining whether a given entity is governed by the Act. *See* Stephanie Francis Cahill, *New York Bar Files Lawsuit Over Gramm-Leach-Bliley*, ABA JOURNAL E-REPORT, May 3, 2002, *available at* http://www.mnplan.state.mn.us/issues/scan.htm?Id=2385. Clearly, the lack of clarity in this regard can be devastating, as parties are forced with the proposition of spending the funds to obtain compliance with the Act, or

comment will discuss the various complexities of the terms embodied in the regulations implementing the GLBA. Part III will discuss the Act's potential application to the legal profession and will suggest potential reforms aimed at more accurately effecting the legislative intent behind the GLBA.

II. THE PROVISIONS OF THE GLBA

A. The Scope of the Act

The GLBA begins by announcing a general policy in favor of consumer privacy.[7] The GLBA broadly states that it applies to "financial institutions," which are defined as businesses which are significantly engaged in the financial activities listed by Section 4(k) of the Bank Holding Company Act.[8] The regulations, in a non-exhaustive list of financial activities, list the following as within the purview of the Act: retailers that extend credit by issuing credit cards, personal property or real estate appraisers, automobile dealerships who lease vehicles, career counseling service providers, businesses that print checks for individuals, businesses that wire money for individuals, check cashing businesses, accountants and tax preparation companies, travel agencies, businesses providing real estate settlement services, mortgage brokers, investment advisory companies and credit counseling services.[9] However, it is

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face the possibility of weighty fines for non-compliance. *Id.* In fact, fines for violations of the GLBA can be as expensive as $10,000 per day of violation. *See id.*

[7] *See* 16 C.F.R. § 313.1. This initial regulation states that the law seeks to allow consumers a method to "prevent a financial institution from disclosing" private information to non-affiliated third parties. *Id.*

[8] 16 C.F.R. § 313.1(b); *see also* 12 U.S.C. § 1843(k) (2000). The Bank Holding Company Act incorporates by reference activities listed by the Federal Reserve Board in 12 C.F.R. §§ 211.5(d), 225.28. *See* 16 C.F.R. § 313.1.

[9] 16 C.F.R. § 313.3(k)(2). In each instance of identifying a financial institution that is subject to the GLBA, the Act explains why the entity is determined to be such an institution. *Id.* However, in order to be considered a financial institution under the Act and thus subject to the terms of the GLBA, the business must be "substantially engaged" in a financial activity. 16 C.F.R. § 313.3(k)(1). In fact, the GLBA expressly excludes entities that are not substantially engaged in financial activities from the definition of financial institutions. 16 C.F.R. § 313.3(k)(3)(iv). Neither the Act nor any federal case law construes the term "substantially engaged" in this context. Additionally, the Act limits the term financial institution to exclude retailers with "lay-away" programs, retailers who

most notable that the GLBA applies only to financial institutions that provide services to individuals for personal, family or household uses.[10]

B. The Requirements of the GLBA

Generally, the GLBA requires that a financial institution give an initial notification of its privacy policy with respect to the disclosure of nonpublic personal information of customers.[11] The Act defines nonpublic personal information as any personally identifiable financial information as well as "[a]ny list, description, or other grouping of consumers (and publicly available information pertaining to them) that is derived using any personally identifiable financial information that is not publicly available."[12] As will be discussed, the Act's broad definition of "financial institution" coupled with the required

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merely accept payment by check and merchants allowing consumers to "run a tab." 16 C.F.R. § 313.3(k)(4). While an exhaustive list of "financial institutions" would be an impossibility, the scope of the Act varies wildly with one's construction of this term.

[10] 16 C.F.R. § 313.1(b). Therefore, the GLBA does not affect businesses that provide "financial services" to commercial customers. *Id.* Specifically, the Act excludes financial institutions who provide services for business, commercial or agricultural customers from its mandates. *See id.* As is apparent, this limitation significantly narrows the scope of the GLBA.

[11] 16 C.F.R. § 313.4. The Act requires that financial institutions give customers notice of their privacy policy at the time a "customer relationship" is established. 16 C.F.R. § 313.3(h)(2)(k). In an effort to clarify when institutions subject to the GLBA must provide this initial privacy notice, the Act lists a variety of examples which may signal the establishment of a customer relationship. *See* 16 C.F.R. § 313(h)(i)(1). The GLBA states that customer relationships may form when a person obtains a credit or investment account, obtains a loan, purchases an insurance product, enters into a home mortgage or vehicle loan, or enters into a lease of personal property. *Id.* However, in the most troubling respects, the Act states that a customer relationship may be formed when a financial institution provides real estate settlement services or when a customer becomes the client of the institution for purposes of obtaining tax preparation or credit counseling. *Id.*

[12] 16 C.F.R. § 313.3(n). Further, the Act notes that nonpublic personal information may include any list of individuals' names and street addresses that is derived using personally identifiable information. *Id.* Additionally, nonpublic information may include information that a customer provides to an institution, or any other information obtained about the customer during the performance of the financial services. 16 C.F.R. § 313.3(o)(1). However, it is noted that publicly available information is not included in the definition. 16 C.F.R. § 313.3(n)(3).

privacy policy notices that the definition of "customer relationships" increases the ambiguity of the application of the GLBA.[13]

In addition to requiring financial institutions to supply customers with a privacy policy at the outset of a customer relationship, the GLBA requires financial institutions to give customers annual privacy notices.[14] However, the Act only requires privacy notices to be provided to current customers.[15] Thus, as the Act states, "[y]ou are not required to provide an annual notice to a former customer."[16]

After realizing that customers of financial institutions must be provided with both initial and annual privacy notices, businesses are faced with the obvious problem of what information should be included in the privacy notice.[17] The GLBA

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[13] *See* Cahill, *supra* note 6. Particularly, it is easy to see that the Act's mention of the provision of "real estate settlement services" and provision of tax advice as events which trigger a customer relationship as troubling to those in professions not otherwise clearly subjected to the Act. *See supra* note 9 and accompanying text.

[14] 16 C.F.R. § 313.5(a)(1). The GLBA requires that both the initial privacy notice and the annual privacy notice to be a "clear and conspicuous notice to customers that accurately reflects your privacy policies." *Id.* The annual notice required by the Act must be given at least once in any period of twelve consecutive months. *Id.* The financial institution is required to set their own twelve month period, however, it must be applied on a consistent basis. *Id.*

[15] 16 C.F.R. § 3135(b). Financial institutions are not required to send privacy notices to persons after the termination of the customer relationship. *Id.*; *see supra* note 11.

[16] 16 C.F.R. § 313.5(b)(1). The GLBA supplies financial institutions with a variety of instances in which a customer may become a "former customer" and an annual notice is no longer required. *See id.* § 313.5(b)(2). Generally stated, a customer may become a former customer when all financial services desired have been completed. *Id.* As an example, in the area of real estate settlement services, a confusing area of the GLBA at best, the customer relationship terminates upon the completion of execution of all documents pertaining to the real estate closing, when the institution has been paid for its services, or when all responsibilities of the institution have been completed, whichever is later. *Id.* § 313.5(6)(2)(vi). Additionally, the customer relationship in regard to tax preparation service is said to terminate whenever the institution has "received payment for the service and no longer provide[s] . . . statements or notices to the customer." *Id.* § 313.5(b)(2)(v). Regarding institutions, and perhaps even attorneys, the "customer relationship" and required privacy notifications may continue long past the date suggested by common-sense. *See* Fischer, *supra* note 2 (noting continuing relationship with respect to 'inactive' deposit accounts).

[17] *See* 16 C.F.R. § 313.6(a) (stating generally requirements of privacy notice).

requires that financial institutions disclose the categories of nonpublic information collected, the categories disclosed, the non-affiliated third parties the information is disclosed to, an explanation of the customer's rights to opt out of the disclosures and the business' practices with respect to protecting the customer's privacy.[18] Additionally, to accommodate the exceptions to the restrictions on disclosures in the Act, institutions are allowed to simply state that they make other disclosures that are "permitted by law."[19] For each requirement of the annual and initial privacy notices, the GLBA attempts to provide insight through examples, in hopes of covering some of the infinite circumstances that may arise in practice.[20]

Even if a financial institution subject to the GLBA does not disclose, nor wishes to disclose, nonpublic information about customers to nonaffiliated third parties, the institution must still supply customers with a "simplified notice."[21] Un-

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Although the GLBA states the requirements for privacy notices with some degree of specificity, the privacy notices of differing institutions vary dramatically.

[18] *See* 16 C.F.R. § 313.6(a)(1)-(9). In addition, while the Act does not require that privacy notices be sent to former customers, it does require the institution to include what, if any, information the business releases concerning former customers. *Id.* § 313.6(a)(4). Further, financial institutions must supply customers with information regarding any disclosures made under the Fair Credit Reporting Act. 16 C.F.R. § 313.6(a)(7); *see also* 15 U.S.C. § 1681a(d)(2)(A)(iii) (2000).

[19] 16 C.F.R. § 313.5(b). The exceptions, such as disclosing information necessary to effect the service requested by the customer or disclosures to affiliated parties, will be discussed below.

[20] *See id.* § 313.6(c). For instance, the regulations state that an institution adequately states what categories of nonpublic personal information it discloses if it lists the general type of the information and provides a few examples to illustrate the type of category. *Id.* § 313.6(c)(2). As to the parties to whom non-public information is disclosed, the regulations merely require institutions to list a general categorization of the businesses, such as "insurance agents" or "mortgage bankers." *See id.* § 313.6(c)(3)(i).

[21] *Id.* 313.6(c)(5). An institution is required to supply at least a simplified notice when it makes no disclosures of nonpublic personal information other than those specifically excepted under the regulations. *Id.* The appendix to the regulations enforcing the GLBA contains an assortment of "sample clauses" designed to serve as a template for institutions drafting privacy notices. 16 C.F.R. § 313 app. A. As an example, an institution providing a simplified notice may begin the privacy notice by stating that "[w]e do not disclose any nonpublic personal information about our customers or former customers to anyone, except as permitted by law." *See id.* § 313 app. A-3. Further, the regulations promulgated under the Act provide that "[c]ompliance with a sample clause . . . constitutes compliance" with

der this simplified notice, financial institutions are required to state that no such disclosures are made and are required to alert the customer of the type of information that is collected, the policies and practices in place to protect that information, and that it may make other disclosures "as permitted by law."[22]

Furthermore, the GLBA weaves a tangled web of exceptions and opt-out provisions. The regulations implementing the Act require that the privacy notice explain a customer's right to opt-out of disclosures, including ways by which the customer may exercise that right.[23] Under the terms of the GLBA, an institution is prohibited from disclosing any nonpublic information to nonaffiliated third parties, unless the customer is given a reasonable opportunity to opt-out and the customer does not opt-out of such disclosures.[24] Although the

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the Act. *Id.* § 313.2.

[22] *Id.* § 313.6(c)(5); *see also* § 313.6(a)(1), (8), (9), (b). Thus, even the "good-guy" institutions that maintain customer confidences and do not make disclosures of non-public financial information are required to supply customers with a privacy notice. The mere fact that the regulations allow for a simpler notice is likely small comfort to the non-disclosing business, which complies with the terms of the Act because it is uncertain if it is required to. It is particularly notable here that attorneys, who are prohibited from breaching client confidences under State law, would still be required to provide clients with privacy notices, if they are indeed subjected to the Act.

[23] *See id.* § 313.6(a)(6) (requiring that privacy notice contain explanation of customer's opt-out rights). The GLBA defines opt out as "a direction by the consumer that you not disclose nonpublic personal information about that consumer to a nonaffiliated third party, other than that permitted by §§ 313.13 (disclosures required to perform services requested), 313.14 (allowing disclosure to third parties who perform services for the institution) and 313.15 (allowing miscellaneous exceptions, including reports to credit reporting agencies)." *Id.* § 313.10(a)(2).

[24] 16 C.F.R. § 313.10. The Act states that sending opt-out notices by mail or by electronic means in cases of electronic transactions will constitute "reasonable opportunities" to opt-out of the disclosures. *See id.* § 313.10(a)(3). Additionally, the Act provides for institutions to allow consumers to "partially opt-out" of disclosures by selecting which nonpublic personal information should not to be disclosed. *Id.* § 313.10(a). However, despite the noble intentions of the legislators and regulators as to this point, the Act falls far short of its stated goal of securing consumer privacy by employing an "opt-out" rather than an "opt-in" policy. While the GLBA currently costs businesses, and thus consumers, thousands of compliance dollars, the effectiveness of the Act is clearly less than ideal. Customers must choose for their information not to be disclosed, rather than choose the information to be disclosed. Intuitively, the actors in this area would be saved

Act requires consumers to "opt-out" of disclosures rather than an "opt-in" system, once the consumer makes an opt-out election, the election is binding on the institution.[25]

After all of the hurdles of deciding whether the GLBA is applicable to a particular business and in drafting privacy notices to fit the institutions' needs, the business must still comply with the Act's terms regarding delivery of the notices. In short, the Act states that all notices required to be provided must be provided so that each consumer "can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically."[26] Financial institutions may mail initial and annual privacy notices to customers, but are cautioned against utilizing means of delivery that reflect an "unreasonable expectation of actual notice."[27] Further, the Act

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both time and money and consumer privacy would be better served under an opt-in system.

[25] *Id.* § 313.7. A consumer may opt-out of disclosures to nonaffiliated third parties at any time during the customer relationship and the opt-out direction continues until the customer revokes it, even after the customer relationship terminates. *Id.* However, of course, the opt-out direction of customers does not affect institutions' ability to make disclosures under sections 313.13, 313.14 and 313.15. *See supra* note 23 and accompanying text.

[26] 16 C.F.R. § 313.9(a). The GLBA lists a variety of examples for complying with this delivery requirement, including: delivery by hand, mailing the notice to a last known address, and clearly and conspicuously placing a notice on a website, where the customer conducts transactions electronically. *Id.* § 313.9(b)(1). The allowance for supplying privacy notices electronically has induced many institutions to take advantage of the provision, ostensibly reducing the costs of compliance with the Act. *See generally* Kay A. Thomas, Fairmark Press Tax Guide for Investors: Privacy Policy and Legal Notices, *available at* http://www.fairmark.com/disclaim.htm (1997-2003) (noting that site does not use "cookies" to capture nonpublic information); Bancorp South Privacy Policy, *available at* http://www.bancorpsouthonline.com/site/inc/ficontent/privacypolicy.html (citing GLBA in discussing use, disclosure and sharing of customer information). In fact, even some federal government agencies post privacy information on their websites. *See, e.g.,* Bureau of the Public Debt Online, Privacy Notices, *available at* http://www.publicdebt.treas.gov/cc/ccdis.htm (last updated Feb. 20, 2003).

[27] 16 C.F.R. § 313.9(a)(2). The Act first states that the mere posting of a privacy policy in the place of business or generally published advertisements of the institution's privacy notice are insufficient methods of delivery. *Id.* Additionally, the GLBA prohibits emailing privacy notices to customers who do not transact business electronically. *Id.* The Act's "reasonableness" restrictions on delivery, preventing a general posting of the privacy notice while arguably better securing consumer privacy, also act to tremendously increase the cost of compliance.

requires that the notice to customers be either capable of retention or accessible by the consumer.[28] A final hurdle in the delivery of privacy notices under the GLBA is encountered in the case of joint notices and joint relationships.[29] Under the former, two financial institutions required to provide privacy notices to a single consumer may satisfy the Act by sending a joint notice.[30] In the latter case, financial institutions are permitted to satisfy the delivery requirements by sending only one notice where two or more customers jointly obtain a financial product from the institution.[31]

Aside from the mechanics of the Act, when the application of the GLBA is considered, it must be remembered that the Act does not seek to preempt state law protecting consumer privacy.[32] While the Act only preempts state law to the ex-

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[28] *See id.* § 313.9(e). Thus, orally relating a privacy notice to consumers is clearly an insufficient delivery of the privacy policy. *See id.* § 313.9(d). In order to ensure that delivery complies with the regulations, institutions may simply comply with the previously discussed provisions regarding delivery; that is, customers may retain or access mailed printed notices or, in the case of electronic customers, a notice posted on the institution's website. *Id.* § 313.9(e)(2).

[29] *See* 16 C.F.R. § 313.9(f)-(g). Generally, the regulations implementing the GLBA graciously allow institutions to prevent consumers from receiving two or more privacy notices where only one would suffice. However, ostensibly, institutions remain required to provide at least one annual notice, an initial notice and revised privacy notices, where applicable. *See* 16 C.F.R. § 313.4 (initial privacy notices; 16 C.F.R. § 313.5 (annual privacy notices); 16 C.F.R. § 313.8 (revised privacy notices). Revised privacy notices must supply consumers with a new opt-out notice and must be delivered in substantially the same manner as other required privacy notices. *See* 16 C.F.R. § 318(a).

[30] *Id.* § 313.9(f). In order to satisfy the delivery requirements via a joint notice, the institutions must identify the notice as a joint notice, and the notice must accurately describe the privacy policies of each institution. *Id.* Additionally, the definitions contained in the regulations promulgated under the GLBA state that an individual is not the customer of one financial institution merely because the institution acts as an agent for another financial institution that has a customer relationship with the individual. *Id.* § 313.3(e)(2)(v).

[31] *Id.* § 313.9(g). However, the financial institution is obligated to provide separate notices to each customer if one of the customers requests individual notice. *Id.* One can scarcely imagine a situation in which joint account holders or customers would need separate identical privacy notices delivered.

[32] *See id.* § 313.17. The Federal Trade Commission's regulations state that the Act should not be construed as "superseding, altering, or affecting any statute, regulation, order, or interpretation in effect in any State, except to the extent that such . . . is inconsistent with the provisions of [the GLBA]." *Id.* § 313.17(a). *See* FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990) (noting that "[i]f the intent

tent of inconsistency, the regulations under the GLBA additionally provide that a state law is not inconsistent, and thus not preempted, if the provisions of the state law afford greater consumer privacy protection "as determined by the Commission."[33]

III. THE ACT'S APPLICATION TO ATTORNEYS

Returning to the scope of the GLBA and the regulations implementing the Act, it remains unclear whether the privacy provisions apply to the legal profession. With the Act's sweeping definition of "financial institutions," a variety of constructions can be imagined in which attorneys are required to comply with the GLBA.[34] In perhaps the most obvious instance, attorneys could be considered to provide "real estate settlement services," which is defined as the provision of a financial service under the Act.[35] Equally likely, attorneys may find

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of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress"). *See also* Friberg v. Kansas City So. Ry. Co., 267 F.3d 439, 442 (5th Cir. 2001) (noting that courts must begin preemption analysis by viewing Congressional intent). The court in *Friberg* additionally noted that Congress may preempt state laws under the Supremacy Clause by either express preemption, such as the case under the GLBA, field preemption or conflict preemption. *Friberg*, 267 F.3d at 442.

[33] 16 C.F.R. § 313.17(b). The regulation continues to state that the Federal Trade Commission, either upon its on motion or upon petition by an interested party, will determine if a State law offers greater protection. *See also* Press Release, Proskauer Rose, LLP, NYSBA v. FTC Complaint, *available at* http://www.proskauer.com/news_publications/press_releases/content2002_04_29_a (May 1, 2002) (noting that this provision may prevent its application to professions whose own privacy or confidentiality rules are more protective than those of the GLBA).

[34] *See supra* notes 9, 10 and accompanying text. Arguably, transactional attorneys engage in countless services that could be viewed as "financial services," thereby rendering them to be considered "financial institutions" and subjecting them to the GLBA. *See supra* note 9, 10 and accompanying text.

[35] *See supra* note 9 and accompanying text. As stated, the Act lists an institution that provides financial settlement services as a financial institution subject to the Act, since these types of institutions are so defined under the Bank Holding Company Act of 1956 as well as 12 C.F.R. § 225.28. This provision may inadvertently operate to include many transactional real estate attorneys who provide real estate closing services to individual clients. *See* 16 C.F.R. § 313.1(b) (noting Act's inapplicability to commercial entitles). *See supra* note 10 and accompanying text.

themselves included within the ambit of the GLBA as providers of tax preparation services or as investment advisors.[36] While the legislative history of the Act does not reflect an intent to subject attorneys to the provisions, due to the costliness of noncompliance, attorneys would be well-advised not to disregard the Act's potential applicability.[37] In light of the costs necessary to comply with the regulations and the costliness of erroneous noncompliance, the New York State Bar has instituted a lawsuit against the Federal Trade Commission in a United States district court, challenging the Act's application to practicing attorneys.[38] In determining whether the terms of the Act apply to lawyers, the courts must decide a variety of issues, including whether attorney-client confidentiality rules provide greater protection than the Act, whether Congress intended the Act to govern lawyers, and potential Tenth Amendment concerns over the federal regulation of attorneys.

First, the Act should be held inapplicable to attorneys, as current attorney-client confidentiality requirements provide more consumer privacy protection than does the GLBA.[39] The Rules requiring attorneys to maintain client confidentiality offer far more protection than the "opt-out" system employed

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[36] *See supra* notes 9, 10, 16 and accompanying text. Likewise, the regulations state that these activities are to be classified as financial services due to their delineation in the Bank Holding Company Act. 16 C.F.R. § 313.3(k)(2)(xii). Again, the question of whether an attorney's provision of filing tax forms for a customer or rendering "investment advice" subjects the attorney to the GLBA necessarily depends on the breadth of construction of the terms. *Cf. id.* § 313.3. However, based on the otherwise broad views taken in the Act, it may be fair to assume such a construction for even the undefined terms.

[37] *See supra* notes 9, 16 and accompanying text. Any entity even potentially subject to the privacy notice requirements of the GLBA must remember the possibility of fines of up to $10,000 per violation. *See* Cahill, *supra* note 6. Thus, many businesses are placed in a catch-22, as they face either the costliness of compliance or the heavy fines of erroneous non-compliance. *See* Cahill, *supra* note 6.

[38] *See supra* note 33 and accompanying text. The lawsuit was filed by the New York firm of Proskauer Rose, LLP on behalf of the New York State Bar. *See supra* note 33 and accompanying text.

[39] *See supra* note 33 and accompanying text; *see also* 313 C.F.R. § 313.17(b) (stating that GLBA does not preempt state law where the state law provides greater protection of consumer privacy).

under the GLBA.[40] The Rules governing attorney-client confidences do not simply require that the client or "customer" be informed of the institution's privacy policies, but they require that client confidences actually be maintained.[41]

Next, the application of the GLBA and regulations enforcing the Act to attorneys would violate the Tenth Amendment's reservation of powers to the states.[42] The power to regulate attorneys is clearly vested in the states, as opposed to the federal government.[43] Additionally, when Federal laws interfere with states' reserved powers under the Tenth Amendment, they must be held invalid to that extent.[44] Therefore, if

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[40] *See supra* note 23, 24 and accompanying text. The confidentiality rule in Mississippi provides that "[a] lawyer shall not reveal information, which is confidential or privileged by law, or relating to representation of a client, which a lawyer has reason to believe may be detrimental to the client or which client has requested not be disclosed." MISS. R. PRO. CONDUCT 1.6(a). Further, the applicable Rule of Professional Conduct lists only a handful of situations in which lawyers may disclose client confidences, where the GLBA is riddled with such allowed disclosures. *See id.*

[41] MISS. R. PRO. CONDUCT 1.6. Without a doubt, Rule 1.6 alone offers infinitely more privacy protection than do the bulky regulations enforcing the GLBA. *See generally* Brian R. Hood, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client* 7 GEO. J. LEGAL ETHICS 741, 745 (1994) (arguing for relaxation of confidentiality rules to permit disclosures, in some circumstances, such as after client's death). Clearly, the GLBA does not go so far as to protect privacy after one's death, as the deceased would then become labeled a "former customer." *See supra* note 16 and accompanying text; *see also* MISS. R. EVID. 502 (recognizing attorney-client evidentiary privilege).

[42] *See* U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *cf.* Collector v. Day, 78 U.S. 113, 123 (1870), *overruled in part by* Graves v. New York, 306 U.S. 466 (1939) (stating that states are wholly independent of federal government in exercise of their "reserved" powers under Tenth Amendment); Graves v. Walton County Bd. of Ed., 300 F. Supp. 188, 193 (M.D. Ga. 1968) (stating "[a] Court of the United States is loathe to interfere in the internal affairs of a state. The sovereignty of the States insofar as reserved to them by the Constitution of the United States is one of the keystones of our federal system.").

[43] *See* Dixon v. Georgia Indigent Legal Servs., Inc., 388 F. Supp. 1156, 1162 (S.D. Ga. 1975) (stating that power to regulate attorneys is clearly within province of states); *see also* Silverman v. Browning, 414 F. Supp. 80, 88 (D. Conn. 1976) (stating that "the state courts do possess the inherent power to regulate who shall practice law before them. . . .").

[44] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (striking down Gun-Free School Zones Act while noting that "[under] our federal system,

the regulation of attorneys is indeed a power reserved to the states and if the GLBA is applicable to attorneys, the Act necessarily violates the Tenth Amendment.[45]

IV. CONCLUSION

The Gramm-Leach-Bliley Act, though well intentioned, is laden with ambiguities and the potential for future litigation. First, the regulations implementing the Act water down the GLBA's stated purpose of safeguarding consumer privacy by employing an "opt-out" system rather than "opt-in" system. This feature alone will reduce the effectiveness of the Act, as common sense indicates that few customers will actually jump through the hoops necessary to opt-out, while many customers may prefer non-disclosure. Next, the scope of the Act's application must be clarified. Currently, professionals who are uncertain of whether the GLBA applies to them are faced with erring on the conservative side and incurring the costs of compliance or with the daunting penalties for non-compliance. Additionally, the regulations implementing the Act should be amended to clearly reflect the Act's inapplicability to attorneys. While currently pending litigation seeks a judicial determination that the GLBA does not apply to attorneys, such litigation would not have been required had the Federal Trade Commission appropriately delineated the Act's scope. In sum, while the GLBA was a noble endeavor in the consumer rights movement, the Act, in its current form, fails to adequately protect consumer privacy and needlessly increases costs among businesses in the non-financial sector.

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the States possess primary authority for defining and enforcing the criminal law." (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)).

[45] *Cf. id.* at 1631. Additionally, the fact that this application of the GLBA appears to violate the Tenth Amendment buttresses the notion that Congress did not intend the Act to apply to attorneys. Further, had Congress sought to include attorneys as "financial institutions" within the meaning of the GLBA, one would assume that, given the ambiguity of the Act, such inclusion would have been made specifically.

Toxic Tort Claims Without Present Injury: The Uncertain Status of Claims of Fear of Future Disease in Mississippi

In the common law of torts, it is axiomatic that as a prerequisite to recovery, a plaintiff must have sustained damages by suffering from an actual injury. The mere "threat of future harm, not yet realized, is not enough."[1] In many jurisdictions, however, this rule is being eroded by claims of fear of future disease by plaintiffs who claim exposure to toxic substances, but who do not presently show symptoms of any disease.[2] Allowing claims for fear of future disease does have some theoretical and emotional appeal. The plaintiffs in toxic tort cases claim they have been exposed to substances that may put them at increased risk of developing diseases in the future. Exposure to toxic substances often causes a very real emotional distress, and, at first glance, it may seem just to require the party responsible for this exposure to compensate the innocently exposed plaintiff. However, a closer look at this issue reveals that allowing claims for fear of future disease would flood the court system with trivial claims. Additionally, awards for fear of future disease to plaintiffs who are presently healthy would deplete the resources of companies responsible for the exposure, thereby draining the funds available to compensate victims of exposure who actually suffer from a present illness. The Mississippi Supreme Court has not yet conclusively stated a position on whether to allow this type of recovery. This comment recommends that Mississippi follow the jurisdictions, including the United States Supreme Court, that choose to uphold the common law requirement of actual injury and disallow claims based on the possibility of future disease.

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[1] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 165 (5th ed. 1984).

[2] *See* Andrew R. Klein, *Fear of Disease and the Puzzle of Futures Cases in Tort*, 35 U.C. DAVIS L. REV. 965, 972-78 (2002) (presenting comprehensive summary of jurisdictions which allow recovery for fear of future disease in absence of present injury and articulating general standards for recovery in those jurisdictions).

I. CURRENT MISSISSIPPI LAW ON FEAR OF FUTURE DISEASE

The Mississippi Supreme Court has not yet upheld recovery for fear of future disease by a toxic tort plaintiff who does not yet show symptoms of any illness. Significantly, the court has denied recovery in a series of cases brought by disease-free plaintiffs who claimed exposure to dioxin, a toxic substance they claimed was emitted by a pulp mill on the Leaf River in Perry County, Mississippi.[3]

In *Leaf River Forest Products, Inc. v. Ferguson*, the first Mississippi case on fear of future disease, the Mississippi Supreme Court denied the plaintiffs recovery because the plaintiffs failed to conclusively prove they had actually been exposed to any toxins through the fault of the defendant.[4] However, the court stated that the plaintiffs' claim for fear of future disease could have been successful if they had presented stronger facts showing exposure.[5] The court announced a

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[3] *See* Prescott v. Leaf River Forest Prod., Inc., 740 So. 2d 301, 309-10 (Miss. 1999) (affirming summary judgment for pulp mill in claim brought by disease-free plaintiffs); Anglado v. Leaf River Forest Prod., Inc., 716 So. 2d 543, 549 (Miss. 1998) (affirming summary judgment against disease-free plaintiffs); Leaf River Forest Prod., Inc. v. Simmons, 697 So. 2d 1083, 1086 (Miss. 1996) (reversing jury verdict for plaintiffs in dioxin exposure case); Leaf River Forest Prod., Inc. v. Ferguson, 662 So. 2d 648, 660 (Miss. 1995) (reversing jury verdict in favor of plaintiffs on claim of emotional distress because of exposure to dioxin).

[4] *Ferguson,* 662 So. 2d at 650. The plaintiffs failed to prove exposure to dioxin, which could have been proved by a blood test. *Id.* at 651. In fact, the defendant's offer to administer blood tests to the plaintiffs to test for the presence of dioxin was declined, with one plaintiff responding that, "if dioxin was in her system and could not be removed she did not want to know about it." *Id.*

[5] *Id.* at 650. The three *Ferguson* plaintiffs lived at least 100 miles down river from the Leaf River paper mill. *Id.* at 651. The plaintiffs brought claims of nuisance and emotional distress because of the mill's alleged release of dioxin into the river. *Id.* A jury awarded them $10,000 each on the nuisance claim, $90,000 each on the fear of future disease claim, and $3,000,000 in punitive damages. *Id.* at 650. Dioxin is a toxic substance that is released as a by-product of the pulp chlorine bleaching process formerly used at the Leaf River mill. *Ferguson*, 662 So. 2d at 650. The plaintiffs did not have their property, well water, or blood tested for the presence of dioxin. *Id.* at 651. Instead, the plaintiffs based their claims of fear of future disease on their perceptions that the river had changed in color over the years, and that fewer fish were being caught from the river. *Id.* The plaintiffs also presented testimony of other river residents who had noticed a change in the river's color, and who had seen fish with open sores caught from

two-part evidentiary requirement for fear of future disease claims: (1) proof that the plaintiffs were actually exposed to a toxic substance, and (2) medical evidence that the plaintiffs' fears of disease are rational.[6] Although the *Ferguson* court denied recovery because the plaintiffs failed to meet these proof requirements, the court specifically stated, "[w]e do not harm and, in fact, preserve a recovery for emotional distress" when the claim is based on the court's prescribed two-prong evidentiary foundation.[7] Therefore, after the Mississippi Supreme Court decided *Ferguson*, it appeared that the court would be willing to recognize recovery for fear of future disease if the plaintiffs presented a strong factual basis for their claims.[8]

Since *Ferguson*, four other groups of healthy plaintiffs have attempted to bring similar claims against Leaf River for fear of future disease as a result of dioxin exposure.[9] The Mis-

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the river. *Id.* at 652. An expert witness for the plaintiffs testified that dioxin was a known human carcinogen, and, based on fish studies performed by the State of Mississippi, the plaintiffs' fears of cancer were reasonable. *Id.* Even the plaintiffs' expert admitted, however, that blood tests were the best way to evaluate if the plaintiffs' health was actually at risk because of dioxin exposure. *Ferguson*, 662 So. 2d at 652. A psychologist for the plaintiffs also testified, stating that he believed their fears of future disease to be "genuine and reasonable under the circumstances." *Id.* at 653.

[6] *Id.* at 650. The court stated that it "[had] never allowed or affirmed a claim of emotional distress based on a fear of contracting a disease or illness in the future, however reasonable." *Id.* at 658. However, the court did not rule out the possibility that a plaintiff with a stronger factual case would be able to recover for fear of future disease, stating that "if one is to recover for emotional distress predicated on 'potential' future illness there must be substantial proof of exposure and medical evidence that would indicate possible future illness." *Id.*

[7] *Id.* at 650. The court held that, as the plaintiffs did not test for the presence of dioxin on their property or in their bodies, they could not recover for their fear of future disease. *Id.* at 651. In reaching this decision, the court called the plaintiffs' fears only "a mental fear, a fear without foundation in fact." *Id.*

[8] *Id.* at 659. The court stated that it "may someday recognize the tort" and allow recovery for fear of future disease. *Id.* According to the *Ferguson* court, "emotional distress based on the fear of a future illness must await a manifestation of that illness or be supported by substantial exposure to the danger, and be supported by medical or scientific evidence so that there is a rational basis for the emotional fear." *Id.* at 650. This test has since been used by the Mississippi Supreme Court in evaluating claims for fear of future disease. *See* S. Cent. Reg'l Med. Ctr. v. Pickering, 749 So. 2d 95, 98-99 (Miss. 1999).

[9] *See* Prescott v. Leaf River Forest Prod., Inc., 740 So. 2d 301, 305 (Miss. 1999); Anglado v. Leaf River Forest Prod., Inc., 716 So. 2d 543, 545 (Miss. 1998);

sissippi Supreme Court did not allow recovery in any of these cases because, as in *Ferguson*, the plaintiffs did not have themselves tested for actual dioxin exposure.[10] Though the key reason for dismissal of the plaintiffs' claims in the *Leaf River* line of cases was lack of proof of exposure, there is language in this series of cases that indicated that the court had abandoned its view from *Ferguson* that a plaintiff with sufficient proof could recover for fear of future disease. In these cases, the Mississippi Supreme Court used increasingly more stringent language in rejecting fear of future disease claims.[11] The court in the most recent *Leaf River* case stated "the fear of future disease claim is *neither recognized nor compensable* under Mississippi law."[12] In another toxic tort action, unrelated to the *Leaf River* line of cases, the court, relying on *Ferguson*, stated definitively, "it is clear that Mississippi does not recognize a cause of action for fear of possibly contracting a disease at some point in the future."[13] However, each of these statements is dicta, since the court's holding in each case was based on a lack of proof of exposure and not based on the court conclusively stating that Mississippi does not recognize this form of recovery. Therefore, though the *Ferguson* opinion indicated that the court would be receptive to a fear of future disease claim based on a strong factual foundation, the trend in subsequent cases was to move away from allowing these claims at all.

However, in *South Central Regional Medical Center v. Pickering,* the Mississippi Supreme Court applied the *Ferguson* test to allow recovery for fear of contracting the

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Beech v. Leaf River Forest Prod., Inc., 691 So. 2d 446, 447 (Miss. 1997); Leaf River Forest Prod., Inc. v. Simmons, 697 So. 2d 1083, 1085 (Miss. 1996).

[10] *See Prescott*, 740 So. 2d at 309. Citing *Ferguson*, the court held in each case that lack of medical proof of exposure to a toxic substance is fatal to a claim for emotional distress based on a fear of future illness. *Id.*

[11] In *Beech*, the court stated that "Mississippi has not recognized a cause of action for fear of future disease." *Beech*, 691 So. 2d at 451.

[12] *Prescott*, 740 So. 2d at 309 (citing *Ferguson* and *Beech*) (emphasis added).

[13] Brewton v. Reichhold Chem., Inc., 707 So. 2d 618, 620 (Miss. 1998). In that case, as in the *Leaf River* cases, the court again rested its opinion on the plaintiff's failure to undergo medical tests to conclusively determine whether they had been exposed to any toxic substances. *Id.* at 619-20.

AIDS virus by a woman who was pricked with a previously used lancet while having her blood sugar level tested in a hospital.[14] In *Pickering*, like the *Leaf River* cases, the plaintiff was unable to present medical evidence proving she had actually been exposed to the feared substance, but the court excused the requirement of medical proof because the hospital disposed of the used lancets without testing them for AIDS.[15] The court allowed the plaintiff's recovery, stating that it relied on the *Ferguson* test as the standard for allowing recovery for fear of future disease claims in Mississippi.[16] In reaching its decision, the court did not mention any of the later *Leaf River* cases, which had indicated that Mississippi does not recognize such recovery.

The AIDS case and the *Leaf River* cases, decided within a relatively short period of time, present very different views of Mississippi's law of recovery for fear of future disease.[17] *Prescott*, decided just three months before the *Pickering* case, emphasized that Mississippi had never allowed such recovery and expressly stated that, based on the previous *Leaf River* cases, fear of future disease was not a compensable claim for damages.[18] In *Pickering*, however, the court focused on

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[14] 749 So. 2d 95, 103 (Miss. 1999).

[15] *Id.* at 102. As the plaintiff was unable to prove exposure because of the defendant's conduct in disposing of the used needles, the court allowed recovery without the conclusive proof it had required in the *Leaf River* line of cases. *Id.* However, the court limited recovery to a ten-month "window of anxiety" the plaintiff had experienced from the time she discovered she may have been exposed, until the time medical experts testified she would have tested positive for the virus if she had contracted it. *Id.* at 103. In reaching this holding, the court quoted the *Ferguson* standard for recovery for fear of future disease, and did not mention the later *Leaf River* dioxin cases which seemed to cast doubt on whether recovery of this type was recognized in Mississippi. *Id.* at 98-99. Notably, the court did not refer to its opinions in *Prescott* or *Brewton*, which had specifically stated that Mississippi does not recognize recovery for fear of future disease. *See supra* note 10 and accompanying text. The court also relied extensively on cases from other jurisdictions allowing recovery for fear of contracting the AIDS virus. *Pickering*, 749 So. 2d at 99-101.

[16] *Id.* at 98-99.

[17] *Compare Prescott*, 740 So. 2d at 309 *with Pickering*, 749 So. 2d at 98-99, 102-03. Both opinions quoted the *Ferguson* standard as the controlling authority in fear of future disease cases.

[18] *See supra* notes 10, 13 and accompanying text. The *Prescott* court did not

Ferguson's formulation of the proof required to sustain a claim for fear of future disease without mentioning that Mississippi had never actually allowed such recovery.[19] Though *Pickering* did not expressly overrule the *Leaf River* cases, it is arguable that the court abrogated its earlier statements in those opinions indicating that Mississippi does not allow recovery for fear of future disease.[20]

In summary, the Mississippi Supreme Court has not yet allowed recovery for fear of future disease in a toxic tort case. The court's opinions in *Prescott* and *Brewton*, containing language stating that Mississippi does not recognize recovery for fear of future disease, are still good law. However, the *Pickering* case, though not a toxic tort case, upheld recovery for fear of contracting a disease in the future, and emphasized that *Ferguson* is the controlling authority in this area.

II. LAW OF OTHER JURISDICTIONS ON FEAR OF FUTURE DISEASE

Jurisdictions around the country are divided as to whether to allow recovery for fear of future disease, and, if it is allowed, what standard to use in evaluating the claims.[21] In

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dwell on the fact that each of the *Leaf River* cases was dismissed for lack of adequate evidence of exposure, and not because the court held that Mississippi does not recognize the recovery sought. *Id.*

[19] *See supra* note 12 and accompanying text.

[20] *See supra* notes 10, 12 and accompanying text.

[21] A recent survey of representative cases from around the country on the law of fear of future disease illustrates that these cases tend to focus on one of two factors: (1) a showing of a physical consequence to the plaintiff, other than mere exposure, and (2) a showing that the emotional distress is reasonable, based on medical evidence showing a likelihood of future disease. Klein, *supra* note 2, at 978 (stating that "one must look at recovery for emotional distress not as a rule, but as an exception.")The following jurisdictions have focused on the requirement of an actual physical impact: Adams v. Johns-Manville Sales Corp., 783 F.2d 589 (5th Cir. 1986) (denying recovery without physical impact under Louisiana law). Burns v. Jaquays Mining Corp., 752 P.2d 28 (Ariz. Ct. App. 1987) (denying recovery in the absence of physical manifestation of disease); Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647 (Del. 1984) (denying recovery without evidence of present illness); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985) (denying recovery in absence of physical impact); Capital Holding Corp. v. Bailey, 873 S.W.2d 187 (Ky. 1994) (denying recovery in absence of physical manifestation of disease); Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982)

light of this split of authority around the nation, the Mississippi Supreme Court should pay special attention to the United States Supreme Court's refusal to allow recovery for fear of future disease. In *Metro-North Commuter R.R. Co. v. Buckley*,[22] an influential case on this issue, the United States Supreme Court declined to allow recovery for fear of future disease under the Federal Employers Liability Act (FELA) to a man extensively exposed to asbestos while working as a railroad pipe-fitter, but who showed no symptoms of any disease.[23] In reliance on the common law of tort recovery, the Court held that, in order to recover, the plaintiff would have to suffer a physical impact.[24] The Court supported this decision with several policy arguments, stating that judges and juries would face special difficulties in evaluating these claims.[25] Additionally, the Court feared that allowing recovery for emotional distress in the absence of any disease would flood the courts with trivial claims.[26]

(denying recovery without evidence of physical impact); Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996) (denying recovery in absence of evidence of present illness).

Other jurisdictions have focused on the reasonableness of a plaintiff's claim for fear of future disease based on the medical likelihood of development of an illness, instead of requiring an actual physical impact. *See* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988) (allowing recovery for fear of future disease when that fear is objectively reasonable); Potter v. Firestone Tire & Rubber Co., 863 P.2d 795, 808 (Cal. 1993) (requiring some "guarantee of genuineness" for recovery, but no physical manifestation of disease).

[22] 521 U.S. 424 (1997).

[23] *Buckley*, 521 U.S. at 427, 444. The plaintiff, in his employment as a pipefitter, would emerge from the railroad tunnels with so much asbestos covering his body that he was known as one of the "snowmen of Grand Central." *Id.* at 446 (Ginsburg, J., dissenting). However, the Court held that even this extensive exposure to asbestos did not warrant recovery for fear of future disease under FELA. *Id.* at 430.

[24] *Id.* The lower court held that the asbestos itself touching his body was a "physical impact," and he was therefore entitled to recovery. *Id.* at 428. The Court rejected this contention, holding that based on established principles of tort law, "with only a few exceptions, common law courts have denied recovery to those who are . . . disease and symptom free." *Buckley*, 521 U.S. at 432.

[25] *Id.* at 433-34. The Court opined that assessing the merits of claims for fear of future disease would pose a great challenge to judges and juries, stating that "testing for the genuineness of an injury alone would be bound to lead to haphazard results." *Id.* at 434 (internal quotation omitted).

[26] *Id.* at 433. The Court feared that "unlimited and unpredictable liability"

The Supreme Court's standard for recovery for fear of future disease as articulated in *Buckley* is more restrictive than the Mississippi Supreme Court's test as established in *Ferguson*.[27] For the United States Supreme Court, proof of exposure, even extensive exposure, is not a sufficient basis for recovery. The high Court, instead, chose not to depart from the common law limitation that some physical manifestation of an actual disease is required before a plaintiff can recover for exposure to a toxic substance.[28]

III. Public Policy Against Allowing Claims for Fear of Future Disease

In addition to being inconsistent with the established common law requirement of an actual physical injury as a prerequisite to recovery, claims for fear of future disease should be disfavored for several public policy reasons.[29] Al-

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would result from allowing recovery for fear of future disease, especially since exposure to known or suspected carcinogens is a commonplace occurrence in our society. *Id.*

[27] *See supra* notes 6, 19, 24 and accompanying text. The Mississippi court stated that a plaintiff would have to prove actual exposure to a toxic substance and medical evidence that their fears of disease are rational. *Id.* The plaintiff in *Buckley* would have satisfied these requirements, but the United States Supreme Court instead chose to limit recovery in tort for exposure to toxic substances to plaintiffs who had actually developed symptoms of some disease. *See supra* note 19, 24 and accompanying text.

[28] The Supreme Court, in *Norfolk & Western Railway Co. v. Ayers*, recently emphasized the limits of its holding in *Buckley* as confined to instances in which the plaintiff has exhibited no symptoms of present disease. 123 S. Ct. 1210, 1214-15 (2003). The *Ayers* court allowed a plaintiff suffering from asbestosis to recover emotional distress damages related to his fear of developing cancer in the future as an element of his total damages. *Ayers*, 123 S. Ct. at 1224. The Court stated that this holding was consistent with *Buckley*, emphasizing that damages for fear of future disease are only recoverable when the plaintiff is presently suffering from an actionable injury, but that such damages are not allowed when the plaintiff is "disease and symptom free" like the plaintiff in *Buckley*. *Id.* at 1218 (quoting *Buckley*, 521 U.S. at 432.

[29] The same public policy concerns which make claims for fear of future disease ill-advised also weigh against the Mississippi Supreme Court's creating a form of recovery for medical monitoring. Mississippi appellate courts have not yet addressed the issue of creating a claim for medical monitoring. Anglado v. Leaf River Forest Prod., Inc., 716 So. 2d 543, 545 (Miss. 1998). In *Anglado*, the plaintiff brought a claim for medical monitoring, but the supreme court held that

lowing any person who has been exposed to a toxic substance to recover for the fear of contracting a disease, no matter how rational that fear may be, would be economically unfeasible because contact with toxic substances is a common occurrence in our society.[30]

Due to the extensive number of Americans who have been exposed to toxic substances, allowing claims for fear of future disease could potentially overwhelm the court system with trivial lawsuits.[31] Nearly every American citizen could poten-

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there was not adequate proof of exposure to support any form of recovery, without specifically speaking to the issue of whether Mississippi recognizes recovery for medical monitoring. *Id.* at 549. Although a full treatment of this topic is outside the scope of this discussion, medical monitoring is another form of recovery often sought by plaintiffs who have allegedly been exposed to a toxic substance, but who do not yet show symptoms of any disease. *See* Victor Schwartz, *Medical Monitoring: Should Tort Law Say Yes?*, 34 WAKE FOREST L. REV. 1057, 1081 (1999) (arguing that courts should chose not to allow claims for medical monitoring). In a medical monitoring claim, a plaintiff who has been exposed to a toxic substance, but who does not currently suffer from any illness, seeks to make the party responsible for his exposure pay the costs of preventative and diagnostic medical treatment resulting from the exposure. *See generally* Arvin Maskin, et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521, 529-30 (2000) (discouraging courts from allowing recovery for medical monitoring for public policy reasons, including "dangerous loosening of the causation requirement" and probability of "dispensing large awards to those whose chances of illness as a result of defendant's conduct are small," thereby reducing funds available to victims of exposure who are truly injured).

[30] *See, e.g.* Pirkle, et al., *Exposure of the U.S. Population to Environmental Tobacco Smoke*, 275 J.A.M.A. 1233, 1237 (1996) (reporting that 43% of American children lived in homes with at least one smoker, and 37% of adult nonsmokers lived in homes with at least one smoker or reported environmental tobacco smoke at work); U.S. Dept. of Health and Human Services, 1 *Seventh Annual Report on Carcinogens* (1994) (stating that approximately three million American workers have been exposed to carcinogen, and many more Americans have been exposed outside workplace); Nicholson, Perkel, & Selikoff, *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1980-2030,* 3 AM. J. INDUST. MED. 259 (1982) (estimating that twenty-one million Americans have been exposed to work-related asbestos).

[31] *See supra* note 24 and accompanying text. The United States Supreme Court based its decision not to allow fear of future disease claims in part because of the potential threat of numerous lawsuits. Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 442 (1997) (noting that "tens of millions of individuals may have suffered exposure to substances" which could be basis for claim of fear of future disease).

tially have a claim for fear of contracting a disease due to exposure to some toxic substance. Additionally, allowing these claims could quickly drain the resources of the parties responsible for the exposure, threatening the availability of funds to compensate victims of exposure who have developed an actual illness.[32]

IV. CONCLUSION

The Mississippi Supreme Court should choose not to recognize fear of future disease due to exposure to a toxic substance as a form of tort recovery. To do so would open the floodgates of litigation, making nearly every citizen of this state a potential plaintiff. Although persons who have been exposed to toxic substances may have a legitimate basis for fearing they will contract a disease in the future, this fear alone is not compelling enough to justify departing from the common law rule that without a present injury, there is no basis for a tort claim. Additionally, public policy weighs against allowing recovery for fear of future disease. Allowing these claims would drain the resources of the parties responsible for releasing toxic substances, making them unable to compensate victims of exposure who actually develop a serious illness. Fear of future disease cases would also create an enormous flood of litigation, adding a heavy burden to the already overwhelmed court system in Mississippi. For these reasons, the Mississippi Supreme Court should definitively hold that claims for fear of future disease because of exposure to a toxic substance, unaccompanied by a present physical manifestation of disease, are not recognized in this state.

Mary Clay Wadlington Morgan

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[32] *See* Maskin, *supra* note 28, at 529 (stating that "dispensing large awards to those whose chances of illness as a result of the defendant's conduct are small poses the real risk that little or not resources will be available to compensate those who are truly injured"). *See also* Hinton v. Monsanto Co., 813 So. 2d 827, 830 (Ala. 2001) (stating that "a 'cost-benefit' analysis counsels against" recognizing recovery for medical monitoring in absence of present injury, due to possibility of enormous numbers of plaintiffs and uncertainty of legal liability in cases without physical manifestation of disease).

RECENT DECISION

Automobile Insurance—Mississippi Uninsured Motorist Statute—Actual Physical Contact Required Where Claim Involves Unidentified Motorist

I. FACTS

On May 1, 1995, an accident caused by an unidentified motorist took the life of David E. Mitchell (Mitchell).[1] The accident occurred when the unidentified driver crossed into Mitchell's lane, causing his car to collide with the car of another motorist, Charles Garrett (Garrett).[2] Mitchell's insurance policy, issued by United Services Automobile Association of San Antonio, Texas (USAA), included uninsured motorists' benefits whereby Mitchell's surviving spouse, Nelda J. Mitchell (Nelda), claimed distribution.[3] USAA denied payment of the benefits to Nelda because the collision did not involve

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[1] Mitchell v. United Servs. Auto. Ass'n, 2001-CA-01362-SCT, ¶ 1, 831 So. 2d 1144, 1195 (Miss. 2002) (en banc). The accident occurred on U.S. Highway 61 in DeSoto County, Mississippi. *Mitchell*, ¶ 4, 831 So. 2d at 1145. Mitchell's death was the result of injuries sustained from the accident. *Id.*¶ 1, 831 So. 2d at 1145.

[2] *Id.* ¶ 4, 831 So. 2d at 1145. The unidentified motorist was a black male driving a white car with Tennessee license plates. *Id.* ¶ 5, 831 So. 2d at 1145. Neither the driver nor the car was found. *Id.* ¶ 4, 831 So. 2d at 1145.. After the motorist swerved into Mitchell's lane, Mitchell was forced off of the road where his station wagon ran underneath Garrett's van and out the other side. *Id.* ¶ 6, 831 So. 2d at 1146. All parties stipulated to Garrett's deposition where he testified that Mitchell's car never actually hit the unidentified motorist. *Mitchell*, 2001-CA-01362-SCT, ¶ 4, 831 So. 2d at 1145.

[3] *Id.* ¶ 1, 831 So. 2d at 1145 The policy provided for $600,000 in coverage. *Id.* Nelda claimed the benefits on behalf of herself and their two children. *Id.*

actual physical contact with the uninsured motorist as required by the policy, as well as Mississippi law.[4]

Nelda filed suit against USAA to recover the uninsured motorist benefits, and the parties agreed to a trial without a jury.[5] Because there was no physical contact between Mitchell and the unidentified motorist, the trial court denied Nelda coverage of the insurance policy.[6] Nelda appealed the trial court's decision to the Mississippi Supreme Court where the supreme court held: affirmed.[7] There will be no recovery under an uninsured motorist insurance policy without actual physical contact between the insured and the unidentified motorist.[8]

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[4] *Id.* ¶ 17, 831 So. 2d at 1148; *see* MISS. CODE ANN. § 83-11-103 (c) (v) (1999) (requiring "actual physical contact" if identity of motorist is unknown). Three parts of the policy were applicable to the case. *Mitchell*, 2001-CA-01362-SCT, ¶ 12, 831 So. 2d at 1147. Section C (1) describes the basic coverage whereby USAA would provide benefits from an accident between the insured and an uninsured motorist "[t]o which no liability bond or policy . . . applies at the time of the accident." *Id.* Section C (2) provides coverage if the other motorist is underinsured. *Id.* Section C (4) provides coverage in the case of a hit and run incident where the owner of the vehicle is unidentified. *Id.* USAA argued that this stipulation in section C (4) provides for benefits *only* in hit and run situations with an unidentified motorist. *Id.* ¶ 17, 831 So. 2d at 1148. Since Mitchell was not "hit" by the driver, Nelda was not entitled to the benefits. *Mitchell*, 2001-CA-01362-SCT, ¶ 17, 831 So. 2d at 1148. USAA contended that sections one and two only apply to identified motorists. *Id.* In addition, USAA argued that the decision to deny benefits was in accordance with Mississippi law. *Id.*

[5] *Id.* ¶¶ 2-3, 831 So. 2d at 1145. The suit was originally filed in Tunica County, but transferred to the Circuit Court of DeSoto County. *Id.* The dispute centered around the consistency of the insurance policy and the Mississippi Uninsured Motorist Statute. *Id.* ¶ 9, 831 So. 2d at 1146. Nelda contended that the policy allowed a broader interpretation than Mississippi law and argued that her claim was "in accordance with [s]ections C (1) and C (2) of the policy." *Id.* ¶ 14, 831 So. 2d at 1147. She argued that section C (4) was the only part of the policy requiring physical contact, however the section was inapplicable to her claim. *Mitchell*, 2001-CA-01362-SCT, ¶ 16, 831 So. 2d at 1148.

[6] *Mitchell*, 2001-CA-01362-SCT, ¶¶ 8-9, 831 So. 2d at 1146. Initially, the trial court denied USAA's motion for a directed verdict. *Id.* ¶ 8, 831 So. 2d at 1146. However, without any proof from USAA, the trial court held that Nelda was not entitled to the benefits. *Id.*

[7] *Id.* ¶ 22, 831 So. 2d at 1149. The Mississippi Supreme Court heard a second issue in the case that pertained to the admittance of certain statistical information. *Id.* ¶ 23, 831 So. 2d at 1149. The court decided that this issue was without merit. *Id.*

[8] *Id.* ¶ 21, 831 So. 2d at 1149. The court reviewed both the policy and the

II. Related Law

There is no requirement that uninsured motorist coverage extend to accidents involving an unidentified driver. However, most states have enacted policies or regulations that allow coverage if the insured can meet certain restrictions.[9] The Mississippi Uninsured Motorist Statute governs the extent to which insurance companies may award uninsured motorist benefits to beneficiaries in Mississippi.[10] Controversy exists

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applicable statute and determined that the two were consistent because both require actual physical contact if the uninsured motorist cannot be identified. *Id.* ¶ 19, 831 So. 2d at 1148. The court agreed with the trial court that the decision was harsh. *Id.* ¶ 20, 831 So. 2d at 1148. However, the supreme court justified the decision as in accordance with legislative intent. *Id.* ¶ 19, 831 So. 2d at 1148.

[9] 46A C.J.S. *Insurance* § 1666 (2001) (discussing how jurisdictions put restrictions on recovery for uninsured motorist benefits). These restrictions include the requirement that both the vehicle and the motorist be unknown or the requirement of physical contact between the vehicles. *See* Jett v. Doe, 551 S.W.2d 221, 223 (Ky. 1977) (allowing insurer to include restrictions concerning "hit and run" provisions in insurance policies). Other states that have enacted restrictions include Louisiana and New York. *See* Cochran v. Riggins Heavy Hauling, 516 So. 2d 1303, 1305 (La. Ct. App. 1987) (disallowing coverage under "hit and run" provision where driver of vehicle was known); Travelers Indem. Co. v. Velez, 124 Misc. 2d 226, 227 (N.Y. Sup. Ct. 1984) (holding insured not entitled to "hit and run" benefits where driver is ascertainable).

[10] Miss. Code Ann. § 83-11-103 (1999). The purpose of the statute is to afford the same protection to those injured by uninsured motorists as those injured by insured motorists. *See* Lawler v. GEICO, 569 So. 2d 1151, 1153 (Miss. 1990) (emphasizing meaning of uninsured motorist statute). Section (c) (v) of the statute goes even further to provide protection where the motorist cannot be identified: "where the owner or operator of any motor vehicle which causes bodily injury to the insured is unknown, actual physical contact must have occurred between the motor vehicle owned . . . by such unknown person and the person or property of the insured." § 83-11-103. This section applies only to unidentified motorists. *See* Brown v. Hartford Ins. Co., 606 So. 2d 122, 125 (Miss. 1992) (holding that section (c) (v) of statute does not pertain to motorist who has been identified). The Mississippi Supreme Court has indicated that physical contact is not required where the driver was identified. *Brown*, 606 So. 2d at 126. In *Brown*, the Mississippi Supreme Court stated that the language of the insurance policy is also considered when deciding whether an insured is entitled to benefits. *Id.* The court reasoned that most litigation involves ambiguous language in the policy that does not match the statute. *Id.* If the language is ambiguous, the court will usually construe the policy in favor of the insured. *Id.*; *see* J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 96-CA-00136-SCT, ¶ 8, 723 So. 2d 550, 551 (Miss. 1998) (stating that Mississippi law recognizes that ambiguous policies "are to be

where the accident involves a "phantom" driver because the Mississippi Supreme Court strictly applies the "actual physical contact" requirement and many times an injured person is not entitled to coverage.[11] This is most often referred to as a "miss and run" situation and can be quite unfavorable to the insured.[12] This section examines the way the Mississippi Supreme Court has applied the Uninsured Motorist Statute when the identity of one of the motorists is unknown, as well as the policy underlying the supreme court's decisions.[13]

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construed strongly against [insurer]").

[11] *See* Michael V. Cory, Jr. & Lanny R. Pace, *Mississippi Uninsured Motorist Law—Where Do We Go From Here?*, 69 MISS. L.J. 455, 481-83 (1999) (discussing strict adherence to physical contact requirement by Mississippi Supreme Court). Some states, on the other hand, have rescinded the requirement for physical contact. *See* Clark v. Regent Ins. Co., 270 N.W.2d 26, 29-30 (S.D. 1978) (discussing jurisdictions which have rejected physical contact requirement). The reasons for rescinding the requirement include public policy considerations or conflicts with state law. *See* State Farm Fire & Cas. Co. v. Lambert, 285 So. 2d 917, 920 (Ala. 1973) (holding physical contact requirement void as against Alabama public policy); Lowing v. Allstate Ins. Co., 859 P.2d 724, 731 (Ariz. 1993) (en banc) (asserting that physical contact requirements are in conflict with Arizona law). *But see* Ward v. Consol. Underwriters, 535 S.W.2d 830, 832 (Ark. 1976) (holding physical contact requirement not against public policy). In addition, some states have enacted exceptions to the requirement of physical contact. *See* Farmers Ins. Exch. v. McDermott, 527 P.2d 918, 921 (Colo. Ct. App. 1974) (abolishing physical contact requirement where evidence eliminates fraud); Farmers Ins. Exch. v. Colton, 504 P.2d 1041, 1043 (Or. 1972) (holding testimony of eyewitness sufficient evidence to satisfy physical contact requirement). Conversely, one Florida court allowed recovery even without corroborating evidence from an eyewitness. Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 430 (Fla. 1971) (allowing recovery from uninsured motorists with no evidence of physical contact); *see also* Gregory A. Weimer, *UN/UIM Coverage Issues*, 26 VT. B.J. 39, 41 (2000) (discussing policy implications of physical contact requirement).

[12] *See* Klimstra v. Granstrom, 95 F.3d 686, 692 (8th Cir. 1996) (discussing physical requirement for "miss and run" cases); *see also* 7A AM. JUR. 2D *Automobile Insurance* § 342 (2002) (defining "miss and run" accidents).

[13] For a full discussion on the necessity of physical contact in most jurisdictions, see David J. Marchitelli, Annotation, *Uninsured Motorist Indorsement: Construction and Application of Requirement That There Be "Physical Contact" with the Unidentified or Hit-and-Run Vehicle, "Miss-and-Run" Cases,* 77 A.L.R. 5th 319 (2000) (examining physical contact requirement in great detail).

A. Physical Contact Required for "Miss and Run" Accidents

In *Anderson v. State Farm Mutual Automobile Insurance Co.*,[14] the Mississippi Supreme Court held that an insured could not recover uninsured motorists benefits from an accident where no physical contact existed between the insured and the unidentified motorist.[15] In *Anderson*, the insured lost control of his vehicle after attempting to pass an unidentified driver, whose alleged negligence caused the accident.[16] However, because there was no physical contact between the two vehicles, the trial court refused to allow coverage.[17] Plaintiffs made a policy argument that proof of the unknown driver's negligence should entitle them to recovery.[18] Nevertheless, the Mississippi Supreme Court reasoned that strict adherence to the statute disallowed coverage, and the decision was not contrary to public policy since the legislature had plainly spoken on the issue.[19]

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[14] 555 So. 2d 733 (Miss. 1990).

[15] *Anderson*, 555 So. 2d at 734. This decision included no dissenting opinions. *Id.*

[16] *Id.* at 733. The exact circumstances causing the loss of control were not entirely clear. *Id.* However, the plaintiffs were prepared to offer evidence to prove the existence of the unknown vehicle through testimony of an eyewitness. *Id.*

[17] *Id.* The trial court granted State Farm's motion for summary judgment and relieved State Farm of all responsibility for payment. *Id.* The supreme court agreed because the only contact that the insured encountered was "his fatal contact with mother earth." *Id.* at 735.

[18] *Id.* at 734. Both parties stipulated to the fact that no contact occurred between the two vehicles. *Id.* However, the plaintiffs contended that public policy "demands" recovery since proof of the other driver's negligence precludes the possibility of fraud. *Id.*; *see* Brown v. Progressive Mut. Ins. Co., 249 So. 2d 429, 431 (Fla. 1971) ("[I]f the injured party can sustain the burden of proof that an accident did occur, he should be entitled to recover . . . ."); *see* Robert K. Lewis, *The Physical Contact Rule for Uninsured Motorist Coverage in Arizona: Where We Were, Where We Are, and Where We Ought to Be*, 36 ARIZ. L. REV. 1033, 1034-36 (1994) (discussing purpose of physical contact provisions). *But see* Clark v. Regent Ins. Co., 270 N.W.2d 26, 30 (S.D. 1978) (rejecting argument that physical contact requirement was intended to prevent fraud).

[19] *Anderson*, 555 So. 2d at 735. The court stated, "[w]here the legislature has enacted upon a subject within its competence, we may not annul or evade what it has done." *Id.* at 734. If the language of a statute is ambiguous, the court will usually construe its meaning. *Id.* However, in *Anderson*, both the statute and the policy explicitly required physical contact, and the court was not ready to supply

B. Liberal Construction in Favor of Insured

In *Papa v. Mississippi Farm Bureau Casualty Insurance Co.*,[20] the insured was allowed to recover under his uninsured motorist policy after being forced to jump off the side of a bridge to avoid being hit by a negligent driver.[21] Papa's insurance company denied coverage, arguing that coverage cannot exist since the policy required the uninsured motorist to strike the insured.[22] The issue on appeal was the proper interpretation of the word "struck," and since the policy was ambiguous, the Mississippi Supreme Court decided it should be "liberally construed in favor of the insured."[23] The court held

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a different interpretation. *Id.* The Southern District of Mississippi adopted this same rule. Autry v. Nationwide Gen. Ins. Co., 948 F. Supp. 615, 619 (S.D. Miss. 1996) (upholding physical contact requirement); *see* Cory & Pace, *supra* note 11, at 482-83 (discussing modern trend in Mississippi). The requirement of physical contact is a significant variation in insurance law in Mississippi since the supreme court tends to favor the insured. *See* State Farm Mut. Auto. Ins. Co. v. Latham, 249 So. 2d 375, 378 (Miss. 1971) (construing policy "liberally in favor of insured"). *See generally* Richard T. Phillips, *A Guide to Uninsured Motorist Insurance Law in Mississippi*, 52 MISS. L.J. 255 (1982) (discussing changes in law in Mississippi).

[20] 573 So. 2d 761 (Miss. 1990).

[21] *Papa*, 573 So. 2d at 762-64. This case was decided shortly after the *Anderson* decision. *Id.* at 760. Even though the facts were similar, the court did not discuss *Anderson* in rendering the *Papa* decision. *Id.* at 760-64. In fact, the court did not even mention the uninsured motorist statute. *Id.* A major distinction between the two cases was the fact that in *Papa*, the uninsured motorist was identified. *Id.* at 762. This important fact will not trigger section (c) (v) of the statute since it only applies to unknown motorists. *See* MISS. CODE ANN. § 83-11-103 (c) (v) (1999) (requiring "actual physical contact" only if identity of motorist is unknown).

[22] *Papa*, 573 So. 2d at 762. Coverage C of the insurance policy provided coverage for injuries "caused by [an] automobile accident, while in or upon, entering or alighting from, or through being struck by any automobile." *Id.* The insurance company argued that this language was unambiguous. *Id.* Since the car did not touch Papa and because he was not even in a car, he should not be allowed to recover. *Id. See generally* Robert Roy, Annotation, *What Constitutes "Entering" or "Alighting From" Vehicle Within the Meaning of Insurance Policy, or Statute Mandating Insurance Coverage*, 59 A.L.R. 4th 149 (1988) (discussing caselaw which interprets ambiguous language in insurance policies).

[23] *Papa*, 573 So. 2d at 763. The insurer's argument was based on a decision of the Virginia Supreme Court which held that without actual impact, the "policy was never activated." *Id.* (quoting Early Settlers Ins. Co. v. Jordan, 229 S.E.2d 871, 873 (Va. 1976)). The Mississippi Supreme Court rejected this argument and

that "struck" was capable of meaning an "imminent danger of being struck" and reversed the circuit court's decision.[24] Since the uninsured motorist was the proximate cause of Papa's injuries, he was entitled to recover.[25]

C. Meaning and Purpose of Physical Contact

In *Southern Farm Bureau Casualty Insurance Co. v. Brewer*,[26] the Mississippi Supreme Court defined the limits to the physical contact requirement.[27] Here, an unidentified driver cut in front of Brewer's car, causing a brake drum to fly

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relied on a more liberal construction of being "struck" by an uninsured motorist. *Papa*, 573 So. 2d at 763; *see* State Farm Mut. Auto. Ins. Co. v. Johnson, 133 So. 2d 288, 290 (Miss. 1961) (providing liberal construction of insurance policy). In *Johnson*, the court affirmed that "[i]n all cases the policy must be liberally construed in favor of the insured, in order to accomplish the purpose of the insurance." *Johnson*, 133 So. 2d at 290.

[24] *Papa*, 573 So. 2d at 763. The court stated that "proper construction of the policy provision 'struck by an automobile' does not necessitate physical contact of the . . . insured with the automobile." *Id.* (quoting 42 AM. JUR. 2D *Insurance* § 632 (1987)). In addition, the court asserted that the insurer's interpretation of the policy meant that Papa would have to *let* the other vehicle hit him in order to recover. *Papa*, 573 So. 2d at 763. Concluding, the court said this logic "inheres some absurdity" and is inconsistent with the concept of mitigating damages. *Id.*

[25] *Id.* at 764. The Mississippi Supreme Court reasoned that the policy should apply to Papa since it was undisputed that the negligent driver's actions were the proximate cause of his injuries. *Id.*

[26] 507 So. 2d 369 (Miss. 1987).

[27] *Brewer*, 507 So. 2d at 371-72. The court relied on several decisions where an unknown driver indirectly caused injuries to the insured. *Id.*; *see Johnson*, 133 So. 2d at 290 (holding physical contact requirement satisfied when insured was struck with plank as result of unknown motorist's actions); Barfield v. Ins. Co., 443 S.W.2d 482, 484 (Tenn. Ct. App. 1968) (holding that object propelled by unknown driver met contact requirement); Johnson v. State Farm Mut. Auto. Ins. Co., 424 P.2d 648, 650 (Wash. 1967) (affirming that contact with second vehicle caused by unknown driver satisfied requirement). *But see* Barnes v. Nationwide Mut. Ins. Co., 186 Cal. App. 3d 541, 543 (Cal. Ct. App. 1986) (holding box of dinette chairs in road not sufficient for physical contact); Allstate Ins. Co. v. Bandiera, 512 So. 2d 1082, 1083 (Fla. Dist. Ct. App. 1987) (declaring mere inference that cinder block fell from phantom driver's car does not satisfy physical contact requirement); Aetna Cas. & Sur. Co. v. Head, 240 So. 2d 280, 281 (Miss. 1970) (holding physical contact requirement not met when bottle thrown from unidentified vehicle hit insured); Davis v. Doe, 331 S.E.2d 352, 353 (S.C. 1985) (holding physical contact with unattached part of unknown vehicle did not satisfy physical contact requirement). *See also* 46A C.J.S. *Insurance* § 1667 (2001) (discussing several instances where intermediate objects caused injury to insured).

into his windshield and injure him.[28] Because the unknown driver did not actually contact Brewer or his vehicle, the issue was whether the brake drum satisfied the requirement of physical contact.[29] A majority of the Mississippi Supreme Court agreed that the requirement was satisfied with either direct or indirect physical contact.[30] In addition, the court interpreted the statute in favor of the insured and stated that the purpose of the physical contact requirement was to prove the presence of another vehicle, therefore preventing fraud.[31] Here, the court reasoned that fraud was not possible since the injury was the direct result of the actions of a hit-and-run driver.[32]

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[28] *Brewer*, 507 So. 2d at 370. The driver hit the brake drum lying in the road, thus sending it flying through Brewer's windshield. *Id.* The facts of the case were not in dispute, and both parties agreed that no contact occurred between Brewer and the unidentified motorist. *Id.*

[29] *Id.* The court reasoned that the force of the first impact between the unknown driver and the brake drum, which caused the second impact between the brake drum and Brewer's vehicle, formed an "unbroken chain of events." *Id.* at 372; *see* Ronald Whitney, *Uninsured Motorist Coverage for Hit-and-Run Vehicles: The Requirement of Physical Contact*, 49 LA. L. REV. 955, 963 (1989) (examining what constitutes physical contact).

[30] *Brewer*, 507 So. 2d at 372. The court stated that the requirement was satisfied as long as "the injury causing impact [has] a complete, proximate, direct, and timely relationship with the first impact between the hit-and-run vehicle and the intermediate [object or] vehicle." *Id.* The court quoted this statement from Springer v. GEICO, 311 So. 2d 36, 39-40 (La. Ct. App. 1975). In *Springer*, the plaintiff was injured as the result of a hit and run accident that caused an intermediate vehicle to strike his vehicle. *Springer*, 311 So. 2d at 39. However, some jurisdictions will only accept direct contact between the insured and the unknown driver. *See* Masler v. State Farm Mut. Auto. Ins. Co., 894 S.W.2d 633, 635 (Ky. 1995) (refusing to extend physical contact requirement to indirect contact as required by Kentucky law).

[31] *Brewer*, 507 So. 2d at 372. "The rationale for the physical contact requirement . . . is to prevent fraudulent claims, ostensibly by providing objective evidence that a vanishing motorist had in fact been involved in the accident." *Id.* at 372 (quoting Clark v. Regent Ins. Co., 270 N.W.2d 26, 28 (S.D. 1978)).

[32] *Brewer*, 507 So. 2d at 372. In part, the court based its decision on the fact that the insurance policy failed to require "direct, as opposed to indirect, physical contact." *Id.* The court implied that it would have precluded recovery had the policy been clear on that issue. *Id.* The court interpreted the policy as having two different meanings, and therefore construed it in favor of the insured. *Id; see Johnson*, 133 So. 2d at 290 (describing liberal construction of statute and policy).

D. Corroboration Exception to the Requirement of Physical Contact

Despite the fact that a third party witnessed the accident in *Massachusetts Bay Insurance Co. v. Joyner*,[33] the Mississippi Supreme Court held that the insured could not recover uninsured motorist benefits without actual physical contact.[34] A black SUV driving alongside Joyner unexpectedly changed lanes, "pushing her out of the road" and into the median.[35] It was undisputed that the unidentified driver was the proximate cause of the accident causing Joyner's death.[36] However, the insurance company denied her coverage because there was no contact between the two vehicles and the policy only covered hit-and-run accidents.[37] In some jurisdictions, corrob-

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[33] 1999-CA-00750-SCT, 763 So. 2d 877 (Miss. 2000).

[34] *Joyner*, 1999-CA-00750-SCT, ¶ 14, 763 So. 2d at 881. Joyner argued that since the facts were not in dispute that another vehicle was present, fraud was not a possibility. *Id.* ¶ 6, 763 So. 2d at 879. However, the court stated that it "was not persuaded by the argument that the purpose of the 'actual physical contact' language of the statute was to prevent fraudulent claims." *Id.* ¶ 7, 763 So. 2d at 880. *But see* Autry v. Nationwide Gen. Ins. Co., 948 F. Supp. 615, 618-19 (S.D. Miss. 1996) (stating that Mississippi recognizes physical contact requirement as "a shield against fraud"); *Joyner*, 1999-CA-00750-SCT, ¶ 16, 763 So. 2d at 881 (McRae, J., dissenting) (recognizing past "liberal interpretation of the uninsured motorist statute").

[35] *Joyner*, 1999-CA-00750-SCT, ¶ 3, 763 So. 2d at 878. The accident occurred on Interstate 220 in Jackson, Mississippi. *Id.* ¶ 2, 763 So. 2d at 878. As a result of being forced into the median, Joyner lost control and flipped her vehicle. *Id.* ¶ 3, 763 So. 2d at 878. Joyner was insured by Allstate and Massachusetts Bay Insurance Company for a total of $230,000. *Id.* ¶ 4, 763 So. 2d at 878.

[36] *Id.* ¶ 3, 763 So. 2d at 878. An eyewitness was driving behind Joyner when she flipped. *Id.* The witness testified that there was no contact between Joyner and the SUV. *Id.* In addition, the police report stated that it was a "one vehicle accident." *Id.* A careful examination of Joyner's vehicle also indicated no contact with the black SUV. *Joyner*, 1999-CA-00750-SCT, ¶ 3, 763 So. 2d at 878.

[37] *Id.* ¶ 6, 763 So. 2d at 879. A portion of the Allstate policy allowed coverage when "a hit-and-run motor vehicle causes bodily injury to an insured person by physical contact with the insured person." *Id.* ¶ 10, 763 So. 2d at 880. Generally, if a policy so states, it may expand the coverage for the insured regardless of the statute. *See* Guardianship of Lacy v. Allstate Ins. Co., 649 So. 2d 195, 199 (Miss. 1995) (stating that policy may expand coverage of statute). Joyner argued that the policies were ambiguous and therefore should be construed in favor of the insured. *Joyner*, 1999-CA-00750-SCT, ¶ 9, 763 So. 2d at 880. Joyner relied on *Papa* to afford him a liberal construction of the policy and to reiterate the impor-

orating evidence will lend enough support to satisfy the physical contact requirement since it eliminates the possibility of fraudulent claims.[38] However, the Mississippi Supreme Court held that physical contact was an absolute necessity to recover uninsured motorist benefits where the driver is unidentifiable, even if there is no possibility of fraud.[39]

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tance of proximate cause. *Id.* ¶11, 763 So. 2d at 880. However, the *Joyner* court reasoned that the word "hit" unambiguously connotes physical contact. *Id.* ¶ 9, 763 So. 2d at 880. This makes a strong distinction between the word "hit" and the word "struck." *Id.*; *see also* James L. Cornell & John H. Thomisee, *Uninsured/ Underinsured Motorist Coverage*, 62 TEX. B.J. 342, 344 (1999) (explaining that most courts view "hit" as unambiguous); *cf.* Royal Ins. Co. of Am. v. Austin, 558 A.2d 1247, 1249 (Md. Ct. Spec. App. 1989) (declaring term "hit and run" does not connote physical contact). *But see* Guzman v. Allstate Ins. Co., 802 S.W.2d 877, 879 (Tex. Ct. App. 1991) (holding that "hit" clearly means physical contact).

[38] Such jurisdictions include Georgia, Kansas, Louisiana and Ohio. *See* Painter v. Cont'l Ins. Co., 504 S.E.2d 285, 288 (Ga. Ct. App. 1998) (upholding corroboration exception to physical contact requirement). The Georgia court explained that corroboration from an eyewitness was sufficient for the question of actual physical contact. *Painter*, 504 S.E.2d at 288. In addition, the Kansas Supreme Court reasoned that a witness with no pecuniary interest in the outcome could provide the necessary information to meet the physical contact requirement. Cannon v. Farmers Ins. Co., 50 P.3d 48, 50 (Kan. 2002) (holding evidence from "disinterested witness" could be used to satisfy physical contact requirement); *see also* Eudy v. State Farm Mut. Auto. Ins. Co., 620 So. 2d 405, 408 (La. Ct. App. 1993) (explaining amendment to Louisiana Uninsured Motorist Statute included corroboration exception); Pinkney v. Progressive Specialty Ins. Co., 597 So. 2d 1168, 1171 (La. Ct. App. 1992) (eyewitness testimony not necessary for corroboration exception to physical contact requirement); Girgis v. State Farm Mut. Auto. Ins. Co., 662 N.E.2d 280, 305 (Ohio 1996) (coining "corroborative evidence test"). The Ohio Supreme Court decided to abolish the absolute requirement for physical contact in cases where the insured could prove presence of the unknown vehicle. *Girgis*, 662 N.E.2d at 305. The court established the corroborative evidence test where independent third party testimony proving the negligence of the unknown driver is sufficient to warrant recovery. *Id.*; *see also* Marchitelli, *supra* note 13, § 5, at 47-59 (elaborating on effect of corroborative evidence). Jurisdictions differ as to the strictness of proving physical contact. *See generally* Dominick Cirelli, Jr., Girgis v. State Farm Mut. Auto. Ins. Co.: *Rescinding the Physical Contact Requirement in Ohio Uninsured Motorist Claims*, 30 AKRON L. REV. 153 (1996) (discussing Ohio's departure from past law). In addition, South Carolina requires an affidavit of the corroborating witness in order to prove the presence of the unknown vehicle. Gilliland v. Doe, 570 S.E.2d 545, 548 (S.C. Ct. App. 2002) (holding eye witness testimony insufficient to entitle recovery without affidavit).

[39] *Joyner*, 1999-CA-00750-SCT, ¶ 14, 763 So. 2d at 881. The court reiterated the importance of giving deference to the Legislature. *Id.* Following *Anderson*, the court "refused to go against the clear meaning of the statute." *Id.* The court accepted the evidence that the unidentified car hit Joyner, but this testimony was

III. MITCHELL V. UNITED SERVICES AUTOMOBILE ASSOCIATION

A. Opinion of the Court

In *Mitchell v. United Services Automobile Ass'n*,[40] the Mississippi Supreme Court held that coverage on an uninsured motorist insurance policy does not exist without actual physical contact between the insured and an unidentified motorist.[41] Since the claim involved an unknown driver, the section of the policy applicable to Nelda explicitly required that the unidentified motorist "hit" the insured.[42] After reviewing the policy, the supreme court determined that Nelda's situation required physical contact.[43] In addition, the Mississippi Uninsured Motorist Statute unambiguously states that "actual physical contact" between the insured and the unknown motorist "must have occurred."[44] The Mississippi Supreme Court acknowledged the testimony from Garrett concerning the proof of the unknown motorist.[45] However, this factor was irrelevant to the court and would not provide an

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not an exception to the requirement of physical contact. *Id.*

[40] 2001-CA-01362-SCT, 831 So. 2d 1144 (Miss. 2002) (en banc).

[41] *Mitchell,* 2001-CA-01362-SCT, ¶ 22, 831 So. 2d at 1149. Justice Smith delivered the opinion of the court. *Id.* ¶ 1, 831 So. 2d at 1149. Justices Pittman, Walker, Cobb and Carlson concurred. *Id.* ¶ 25, 831 So. 2d at 1149. The opinion pointed out the harsh nature of the decision, but strictly adhered to the Uninsured Motorist Statute. *Id.* ¶ 20, 831 So. 2d at 1148-49.

[42] *Id.* ¶ 19, 831 So. 2d at 1148. Section C (4) of the policy explicitly describes vehicles that are "hit and run . . . whose owner or operator cannot be identified and *which hits you* . . . ." *Id.* (emphasis added).

[43] *Id.* ¶ 19, 831 So. 2d at 1148. The court determined that section C (4) was applicable to Nelda since it was the section dealing with unidentified motorists. *Id.* In addition, the court agreed with USAA that sections C (1) and C (2) were inapplicable because they strictly referred to accidents involving identified drivers. *Id.* ¶ 17, 831 So. 2d at 1148.

[44] *Id.* ¶ 19, 831 So. 2d at 1148. This "key language" describes the legislative requirement that contact between the vehicles occur. *Id.* The court followed *Joyner* and refused to interpret any exceptions to this stringent requirement. *Id.* ¶ 21, 831 So. 2d at 1149.

[45] *Id.* ¶ 4, 831 So. 2d at 1145. Both parties agreed with Garrett's testimony that a black male driving a white car forced Mitchell onto the shoulder of the road, causing the collision with Garrett's vehicle. *Id.* However, this information alone was insufficient to properly identify the motorist. *Id.* This is evident because the court applied section (c) (v) of the statute. *Id.*

exception to the requirement in the statute.[46]

In addition, the Mississippi Supreme Court recognized that any type of contact between Mitchell and the unidentified motorist would have resulted in recovery since physical contact is the key component in situations involving miss and run drivers.[47] As horrendous as the result may be, the Mississippi Supreme Court chose to adhere to the statute, therefore precluding recovery in the absence of physical contact.[48]

B. Justice Diaz's Dissenting Opinion

Justice Diaz dissented in the *Mitchell* decision and urged the court to create an exception to the physical contact rule if the insured could produce "undisputed evidence" that an unknown vehicle was the proximate cause of the accident.[49] In addition, Justice Diaz cited several examples whereby other states have abolished the physical contact requirement or have refused to strictly enforce it.[50] Finally, Justice Diaz asserted that the unknown driver's negligence was the proxi-

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[46] *Mitchell,* 2001-CA-01362-SCT, ¶ 20, 831 So. 2d at 1148. The court understood that insurers need protection from fraudulent claims. *Id.* In addition, the court implied that fraud was not a possibility because of Garrett's testimony. *Id.*

[47] *Id.* ¶ 22, 831 So. 2d at 1149. The court reiterated that you must be hit in order to recover uninsured motorists benefits when you cannot identify the other motorist. *Id.* The court based its decision on the *Joyner* decision since both cases involved a lack of any contact with the unidentified driver. *Id.* ¶ 21, 831 So. 2d at 1149.

[48] *Id.* ¶ 20, 831 So. 2d at 1148-49. The court recognized that denial of coverage results in unfair treatment to a plaintiff who could prove negligence by an unknown driver. *Id.* Insured drivers faced with these circumstances would have to let themselves be hit in order to recover uninsured motorists benefits. *Id.* However, if this happened, the insured driver would face criminal charges for failure to prevent damages in an accident. *Id.*

[49] *Id.* ¶ 26, 831 So. 2d at 1149 (Diaz, J., dissenting). Justice Diaz reiterated that the purpose of the physical contact requirement was to prevent fraud. *Id.* In addition, Justice Diaz asserted that disallowing coverage when the plaintiff clearly presents a valid claim "would be contrary to the statutory policy and legislative intent." *Id.*

[50] *Id.* ¶ 29, 831 So. 2d at 1150. Among the states discussed were Alabama, Florida, Louisiana, Massachusetts and West Virginia. *Id.* ¶¶ 30-33, 831 So. 2d at 1150-51. Justice Diaz also pointed out that the motorist in the case *was* identified; he was a black male driving a white car with Tennessee tags. *Id.* ¶ 36, 831 So. 2d at 1152 (emphasis added). This should be sufficient, Justice Diaz stated, to satisfy the statute. *Id.* ¶ 29, 831 So. 2d at 1150.

mate cause for the "unbroken chain of events" that ultimately led to Mitchell's accident.[51] Thus, Mitchell's collision met the requirements of physical contact since there was a direct relationship between the unknown driver's actions and the resulting accident.[52]

C. Justice Easley's Dissenting Opinion

Justice Easley dissented in the *Mitchell* decision and emphasized that the insurance policy extended coverage to Nelda, regardless of the statute.[53] Justice Easley asserted that the section of the policy applicable to Nelda did not require physical contact, and the insurer should have been more specific when drafting the policy.[54] Justice Easley also noted that fraud is not a factor in this case since corroborative evidence proves the presence of the unidentified motorist.[55] Finally, Justice Easley reminded the court that the language of the policy should have been construed in favor of the insured.[56]

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[51] *Mitchell,* 2001-CA-01362-SCT, ¶ 37, 831 So. 2d at 1152 (Diaz, J., dissenting). Justice Diaz discussed how the physical contact requirement was satisfied with contact other than with the unknown vehicle. *Id.* ¶ 37, 831 So. 2df at 1152. Justice Diaz pointed out that these circumstances were no different, because the accident was set in motion by the unidentified motorist. *Id.* ¶ 41, 831 So. 2d at 1153. The unknown driver's negligence caused Garrett to pull to the side of the road immediately before Mitchell collided with him. *Id.* ¶ 43, 831 So. 2d at 1153. Therefore, Justice Diaz concluded that the unknown driver was the proximate cause of the accident. *Id.* ¶ 41, 831 So. 2d at 1153.

[52] *Id.* ¶ 46, 831 So. 2d at 1154-55. Justice Diaz asserted that there was no question that the collision between Mitchell and Garrett met the physical contact requirement. *Id.*

[53] *Id.* ¶ 47, 831 So. 2d at 1155 (Easley, J., dissenting). Justice Easley concentrated on the fact that Nelda met sections C (1) and C (2) of the policy. *Id.* ¶ 48, 831 So. 2d at 1155. Justice Easley stressed that section C (4) pertained to "hit and run" accidents so it was not applicable to Mitchell's "miss and run" accident. *Id.* ¶ 49, 831 So. 2d at 1155.

[54] *Id.* ¶ 51, 831 So. 2d at 1155. Justice Easley argued that the trial court erred when it applied the physical contact requirement of section C (4) to the entire policy. *Id.* In addition, Justice Easley pointed out that although the statute requires physical contact, its requirements do not limit the ability to contract. *Id.*

[55] *Id.* ¶ 52, 831 So. 2d at 1156. Justice Easley joined the opinion of Justice Diaz and many other jurisdictions and urged the majority to enact an exception to the strict requirements of the statute. *Id.*

[56] *Mitchell,* 2001-CA-01362-SCT, ¶ 52, 831 So. 2d at 1156 (Easley, J., dissent-

IV. DISCUSSION

In *Mitchell v. United Services Automobile Ass'n*, the Mississippi Supreme Court continued to strictly adhere to the requirements of the Uninsured Motorist Statute.[57] Instead of providing a liberal interpretation, the court chose complete deference to the legislature and applied the language of the statute and the policy in its most literal sense.[58] As a result, the widow of an insured motorist was deprived of insurance benefits because an unidentified driver failed to physically collide with the insured's vehicle.[59]

Most jurisdictions have included an exception to the physical contact requirement that would allow coverage if the insured provided undisputed evidence that 1) another motorist was the proximate cause of the accident and 2) the motorist responsible for the accident could not be identified.[60] The Mississippi Supreme Court recognized that since both parties agreed to the eyewitness's version of events, it was unlikely that the claim was fraudulent.[61] However, the court rejected

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ing). Justice Easley concluded that since the policy was more lenient on its requirements, construction in favor of the insured results in coverage. *Id.* Therefore, Nelda was entitled to the uninsured motorist benefits. *Id.*

[57] *See supra* notes 11, 41 and accompanying text. *Mitchell* joined the string of cases that have resulted in controversy among the Mississippi Supreme Court because of unfair results to the insured. *See supra* notes 19, 34, 48 and accompanying text. Many states have amended their uninsured motorists statutes for public policy reasons in order to remedy these unfair results. *See supra* notes 11, 38 and accompanying text.

[58] *See supra* notes 19, 39, 44 and accompanying text. The literal interpretation of the statute and the insurance policy indicates a shift in the court from past liberal interpretation. *See supra* notes 19, 23, 32 and accompanying text.

[59] *See supra* notes 47-48 and accompanying text. The court seemed full of remorse for the insured's widow; however, the decision displayed no hesitation or doubt. *See supra* notes 39, 41, 48 and accompanying text.

[60] *See supra* notes 11, 24, 38 and accompanying text. At one time, the Mississippi Supreme Court seemed to focus its decision on proximate cause. *See supra* note 25 and accompanying text. Many states believe that where evidence exists of the proximate cause of the unidentified driver, it is contrary to public policy to require actual physical contact. *See supra* notes 11, 32 and accompanying text.

[61] *See supra* notes 39, 45 and accompanying text. Since Garrett was involved in the collision with Mitchell and since he described the unknown motorist in his deposition, his testimony was undisputed. *See supra* note 46 and accompanying

this exception because the language of the statute speaks clearly and unambiguously.[62] The court failed to state that the purpose of the statute was to prevent fraud and instead upheld past precedence that without physical contact, the insurer will not provide coverage.[63]

V. CONCLUSION

According to the Mississippi Supreme Court, there are no exceptions to the actual physical contact requirement for claims involving unidentified motorists. Likewise, the court implies that this rule of law is not going to change unless the Mississippi Legislature amends the statute. Controversy now exists because the results of these decisions seem harsh and unfair, especially when there is proof that the claim is not fraudulent. There is now a split in the court because four of the justices believe that there should be an exception to the rule. Nevertheless, Mississippi is now one of the few states that have refused to make any exceptions to the physical contact requirement, and responsible drivers are put in an unfavorable position when involved in a "miss and run" accident.

Kimberly A. Easley

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text. Mitchell's only other option was to subject himself to an accident with the unknown driver, a theory the court once called absurd. *See supra* note 24 and accompanying text. Now, it is a subject the court defers to the legislature. *See supra* note 48 and accompanying text.

[62] *See supra* notes 10, 19, 39, 47 and accompanying text. Until the legislature amends the statute, the Mississippi Supreme Court will continue to abide by the statute's literal meaning. *See supra* note 11, 13, 19 and accompanying text.

[63] *See supra* notes 18, 39, 46 and accompanying text. In the past, this court has consistently articulated that the purpose of the statute was to prevent fraud. *See supra* notes 30-32 and accompanying text. However, the present court no longer recognizes this purpose, as evident in the *Joyner* decision. *See supra* note 34 and accompanying text.

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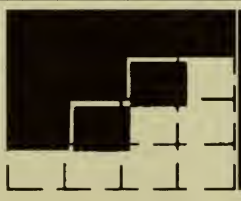

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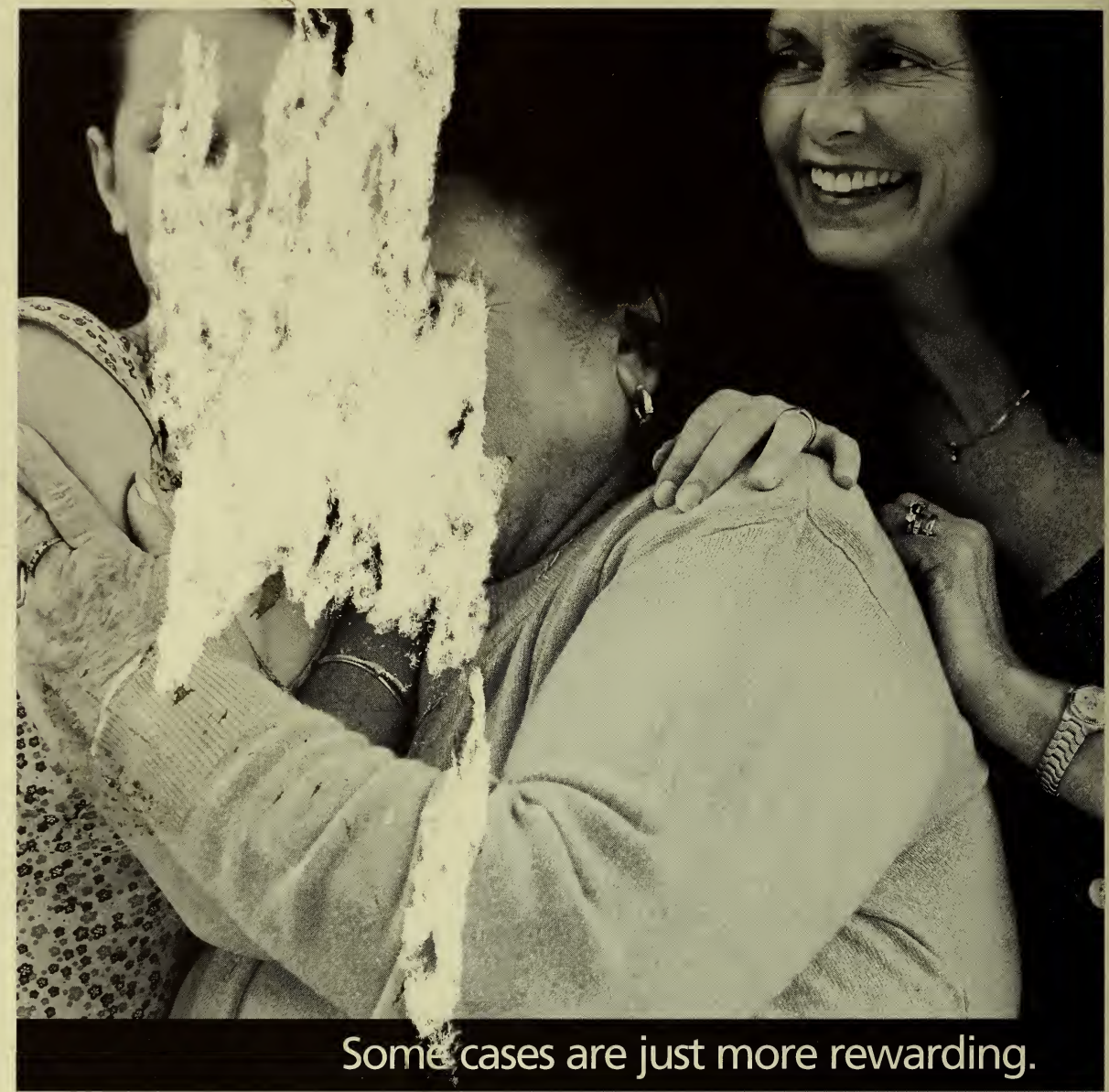

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